(21,913.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 159.

IRENE CUEBAS Y ARREDONDO, APPELLANT,

vs.

FELIPE CUEBAS Y ARREDONDO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATE FOR PORTO RICO.

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1 In the District Court of the United States for Porto Rico.

At a Stated Term of the District Court of the United States for Porto Rico, within and for the District Aforesaid, Begun and Held at the Court Rooms of said Court in the City of San Juan Porto Rico, on the Second Monday of April, being the Thirteenth day of that Month, in the Year of Our Lord One Thousand Nine Hundred and Nine and of the Independence of the United States of America the One Hundred and Thirty-Third.

Present: The Honorable Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a decree in the following cause, to wit:

#144. Equity. Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

Be it remembered that heretofore, to wit, the 22nd day of March, 1904, came the Complainant by her Solicitors and filed her Bill of complaint in this cause, which said Bill of Complaint is as follows, to wit:

IRENE CUEBAS Y ARREDONDO, Viuda de Monge, a Loyal Citizen of the Island of Porto Rico, Residing in the City of Mayaguez, Porto Rico, Complainant,

versus

FELIPE CUEBAS Y ARREDONDO, a Loyal Citizen of the United States, Residing in the City of Mayaguez, Porto Rico; Francisco Antongiorgi, a Loyal Citizen of the Island of Porto Rico, Residing in the Municipality of Yauco, Porto Rico, and El Banco Territorial y Agrícola, a Corporation Organized Under the Laws of Spain, and a Citizen Thereof, Doing Business in the Island of Porto Rico, With Its Principal Place of Business in the City of San Juan, Porto Rico, Defendants.

2 Irene Cuebas y Arredondo, Viuda de Monge, a loyal citizen of the Island of Porto Rico, residing in the City of Mayaguez, Porto Rico, Complainant, brings this her bill against Felipe Cuebas y Arredondo, a loyal citizen of the United States, residing in the City of Mayaguez, Porto Rico, Francisco Antongiorgi, a loyal citizen of the Island of Porto Rico, residing in the City of Yauco, Porto Rico, and El Banco Territorial y Agricola a Corporation, organized under the laws of Spain, and a citizen thereof and doing business in the Island of Porto Rico, with its principal place of business in the City of San Juan, Porto Rico.

And thereupon your orator complains and says:

I.

That upon the seventh day of October of the year of Our Lord One Thousand Eight Hundred and Seventh-Five Assur Henry Moses, Moses S. Moses, Arthur Abraham Levy, Edward Levy and Alfred Marston, partners, trading under the firm name and style of Moses Levy and Company, in the City of London, England, were seized as the owners in fee of the following described tract or parcel of land, to wit:

An estate called "Carmelita," containing Four Hundred and Ten cuerdas of land, more or less, situated in the barrio of Bajura, Municipality of Cabo Rojo, and bounded by lands the property of Federico Carbobell, of the heirs of Manuel Ramirez, of Zenon Betances, of Nolasco Vega, Rafael Bello, Fabian Ramirez, Rafael Rivera, Fernando Rodil, José Ramon Carbonell, by the brook called "Pileta," by the town of Cabo Rojo and by lands belonging to the Succession of Celedonio Carbonell, together with the shops and buildings for quarters and the elaboration of sugar, oxen carts, engine, distillery, agricultural implements, dwelling houses and other appurtenances.

II.

That the said mercantile Firm acquired the said premises by a deed of conveyance executed upon the said seventh day of
3 the month and year aforesaid by Doctor Salvador Carbonell in the City and Municipality of Cabo Rojo, Porto Rico, before the Notary Public Pedro Maria Martinez in favor of Felipe Cuebas y Arredondo, as the general agent and attorney in fact of the said partnership; that by the terms of said conveyance as a part of the consideration thereof and of the purchase price of said premises the said firm of Moses Levy and Company and the said defendant Felipe Cuebas y Arredondo, as agent and attorney in fact thereof as aforesaid, assumed, undertook and expressly bound themselves to pay several credits liens and encumbrances then existing and placed upon the said estate and premises, and among others a valid and subsisting claim and lien of José Ramon Carbonell amounting to the sum of twelve thousand dollars, whereby the said vendees became and were indebted and promised to pay to the said José Ramon Carbonell the said sum of twelve thousand dollars upon the following terms and conditions, Two thousand Dollars Cash and a balance of Four thousand five hundred dollars in the month of March of the ensuing year of Our Lord One Thousand Eight Hundred and Seventy-six; it being by the terms of said conveyance expressly stipulated, agreed and understood that upon failure to pay the said instalment of four thousand five hundred dollars aforesaid, upon maturity thereof as aforesaid, the said cash payment of two thousand dollars should be and become forfeit, and the entire sum of twelve thousand dollars should at once become due and payable.

III.

And your orator further respectfully represents unto your Honor that in order to secure the payment of the said sum of twelve thousand dollars in the manner and form aforesaid, the said Mercantile firm and the said defendant Felipe Cuebas as general agent and attorney thereof as aforesaid, upon the said seventh day of October of the year of Our Lord One Thousand Eight Hundred and Seventy-Five voluntarily mortgaged the whole of said estate and premises unto the said José Ramon Carbonell, paying the said Two Thousand dollars in California gold and American silver, and
4 expressly stipulating and agreeing to the forfeiture of same and to the maturity of the whole of said debt of twelve thousand dollars immediately upon failure to meet the instalment of four thousand five hundred dollars due the month of March of the year of Our Lord One Thousand Eight Hundred and Seventy-six as aforesaid. All of which will more fully appear from an English translation of said mortgage hereto attached, marked Exhibit "A," and now here made part hereof.

IV.

And your orator further respectfully represents unto your Honor that the said mercantile firm of Moses Levy and Company by deed of conveyance duly executed before the notary William Weeb Wenn in the City of London, England, on the twenty-first day of November of the Year of Our Lord One Thousand Eight Hundred and Seventy-Five, granted, bargained, sold and conveyed unto the said defendant Felipe Cuebas the whole of the above described Estate and premises, together with all the appurtenances thereunto belonging, in consi-eration whereof and as a part of the purchase price of same the said defendant Felipe Cuebas y Arredondo assumed and undertook to pay the said mortgage credit of twelve thousand dollars, with legal interest thereon from maturity, in the manner and form as aforesaid, all of which will more fully appear from an English translation of said deed of conveyance hereto attached, marked Exhibit "B," and made a part hereof.

V.

And your orator further respectfully represents unto your Honor that on the thirtieth day of March of the Year of Our Lord One Thousand Eight Hundred and Seventy-Six the said José Ramon Carbonell by virtue of a public instrument executed before the Notary public Carlos Bonilla in the City and Municipality of Mayaguez, Porto-Rico, cessioned, transferred, bargained sold and conveyed to one, José Maria Monge for the consideration of Four Thousand Five Hundred Dollars, all his right, title and interest in and to the said mortgage credit of twelve thousand dollars; all
5 of which will more fully appear from an English translation of said instrument of sale and transfer hereto attached marked Exhibit "C," and made part hereof.

VI.

And your Orator further represents unto your Honor that the said José Maria Monge, on the 26th day of January of the Year of Our Lord One Thousand Eight Hundred and Ninety One, in the City of Mayaguez, before the Notary Santiago R. Palmer, made and executed his last will and testament, naming as his universal heir his wife Irene Cuebas y Arredondo and bequeathing to her all his estate of every kind whatsoever, and providing for the extra-judicial execution of said will and administration of said Estate; all of which will more fully appear from an English translation of said Last Will and Testament hereto attached, marked Exhibit "D," and made part hereof.

VII.

And your Orator further shows unto your Honor that the said José Maria Monge departed this life, without issue, upon the eleventh day of March A. D., 1901, leaving his surviving spouse, your orator, as his sole and universal heir, as appears from Exhibit "E," hereto attached and made part hereof.

VIII.

And your Orator further represents unto your Honor that the said defendant Felipe Cuebas y Arredondo, upon the first day of April A. D., 1892, in a public instrument and power of attorney executed in favor of his wife, Josefa Padilla y Urrutia, before the Notary Santiago R. Palmer, in the City of Mayaguez, expressly acknowledged and confessed the indebtedness of Twelve Thousand dollars with legal interest thereon from maturity as aforesaid, and recognized as valid and binding the lien of the mortgage of your orator, and stated that the said mortgage had been extended from year to year by the said José Maria Monge until the time of his death at the special instance and request of the said defend-
6 ant Felipe Cuebas y Arredondo and upon the express condition and understanding that the same should subsist and remain in full force, validity and effect at all times as a lien upon said premises, and be so recognized as such as aforesaid, and the said defendant therein authorized the said agent and power to pay the same and expressly forbid any defense or objection thereto, as more fully appears from an English translation of said Power of Attorney hereto attached, marked Exhibit "F," and made part hereof.

IX.

And your orator further represents unto your Honor that no part of said mortgage or of the interest thereon has been paid, either to the said José Ramon Carbonell, or to the said José Maria Monge, or to your orator the Complainant herein; but that the whole remains due and unpaid to your orator, both principal and interest, and that no proceedings at law have been had to recover the debt secured by the said mortgage, or any part thereof.

X.

And your orator is informed and believes and therefore avers that Francisco Antongiorgi and the Banco Territorial y Agrícola have or claim some interest in said mortgaged premises, or in some part thereof, as purchasers, mortgagees or otherwise, the exact nature and extent of which interests are unknown to your orator, if any at all they have, but the same are inferior and subsequent to the lien of the mortgage of your orator and subject thereto.

To the end therefore that your orator may have that relief which he can only obtain in a Court of equity, and that the said Defendant may answer the premises, he now prays the Court:

That the above named Felipe Cuebas y Arredondo, Francisco Antongiorgi and El Banco Territorial y Agrícola, the defendants in this suit may appear before this Honorable Court and
7 answer this your orator's bill according to the rules and practice of said Court, but without oath, their answers under oath being hereby waived, and that the usual decree may be made for the sale of the mortgaged premises aforesaid, and for the payment of the amount due to your orator for principal and interest upon the said mortgage, and the costs of this suit, and that the said defendants and all persons claiming under them subsequent to the commencement of this suit, and all other persons although not parties to this suit who have any liens or claims thereon by or under any such subsequent jugdment or decree, either as purchaser, incumbrancer or otherwise, may be barred and foreclosed of all Equity of redemption in the said premises and that your orator may have such other and further relief as the nature of the case may require, and as to this Court may seem meet and agreeable to Equity and good conscience.

And may it please your Honor to grant unto your orator a Writ of Subpœna issuing out of and under the seal of this Hon-rable Court to be directed to the said Felipe Cuebas y Arredondo, Francisco Antongiorgi and El Banco Territorial y Agrícola, commanding them and each of them, on a certain day and under a certain penalty in the said writ to be inserted, personally to be and appear before your Honor in this Honorable Court, and then and there full, true and perfect answer make to all and singular the premises, and further to stand, perform and abide such further order, direction and decree herein as to your Honor shall seem meet and agreeable to equity and good conscience.

(Sgd.) HORTON AND CORNWELL,
Solicitors for Complainant.

And on the 6th day of April, A. D., 1904, there was filed by Complainant's Solicitors in the Clerk's office of the aforesaid Court, a certain Exhibit marked Exhibit "A," which is as follows:

8 COMPLAINANT'S EXHIBIT "A."

(Filed April 6th, 1904.)

Inscription number one hundred and seven. In the town of Cabo Rojo on October 7th, 1875, before me Don Pedro Maria Martinez, Notary and a resident of same and of the Notarial College of Porto-Rico, and witnesses to be stated later on, appear: As party of the first part, Don Felipe Cuebas, merchant, a resident of the United State of America, and as party of the second part, Don José Ramon Carbonell, also a merchant of Cabo Rojo, I swear as to the acquaintance, professions and residences of the parties who have also credited their personalities; the first, by means of his passport issued with all legal requisites to him as foreigner; and the second, by means of his schedule for public security No. 83, issued by Mayor Delgado on February fourth, which documents they exhibited and I returned; and both having asserted to be married, of full age, and in full enjoyment of their civil rights and free administration of their property, and to have the necessary capacity to execute this instrument of mortgage obligation; the said Don Felipe Cuebas stated: That as general agent of the business house of Moses Levy and Company of London, by powers granted on May 14th of this year, before the Notary of said City William Webb Werm Junnier, and certified by the General Consul of Spain for the United Kingdom of Great Britain, and which he exhibits and I return, he agreed to and executed, on the same date and office, with Dr. Salvador Carbonell, a resident of Mayaguez, the conveyance and purchase of the sugar estate "Carmelita," situated in this Municipal term, whereby the grantor bound himself to pay several credits then placed on the estate, one of which in favor of José Ramon Carbonell, of this vecinity, and amounting to $12,000.00 to be paid in the manner agreed by them, which they did in the following form: $2,000.00 cash, and $4,500.00 (Four thousand five hundred dollars) in March of next year, '76, on condition that if it was not so done, the $2,000.00 already paid in cash would remain to the
9 benefit of the payee, as a penalty for the failure to pay the rest; and who will have the right to collect from that moment, that is to say, from the said month of March, 1876, the total sum of $12,000.00; and having carried out this agreement in the form provided by law, knowing at the same time his rights in the present case, states: that he acknowledges, declares and confesses to be indebted in his alleged capacity and by virtue of the facts already stated, to the said José Ramon Carbonell, or order, in the sum of $12,000.00 current money, which he will pay in the following form: $2,000.00 which he now delivers to him in my presence and that of the witnesses, in gold coins (Californias) and American silver; and $4,500.00 which he will deliver to him in cash on March of the next year, 1876, as full balance; it being expressly agreed that if at the arrival of that month of March, 1876, the payer fails to pay the said sum of $4,500.00, the other sum of $2,000.00 just received

will remain for the benefit of Carbonell, who will have full right to claim and collect from him the total sum of $12,000.00 to which his credit against the estate "Carmelita" amounts, without any action or question being necessary; and in the case that it should happen so, he will answer in his alleged capacity to the creditor for any costs, damages, prejudices and injuries that may ensue, and the latter may proceed against him with all legal force and summary proceedings in order to compel him to fulfill the things therein agreed upon. And in order that this agreement may be executed as determined, without the special obligation being in any way prejudiced or affected by the general one or vice versa; and that José Carbonell may use either one at his election, he specially mortgages and encumbers the said estate "Carmelita," which measures Four Hundred and Ten cuerdas, more or less, situated in the barrio of Bajura of this term; limited by lands belonging to Federico Carbonell, heirs of Manuel Ramirez, Zenon Betances, Nolasco Vega, Rafael Bello, Fabian Ramirez, Rafael Rivera, Fernando
10 Rodil, José Ramon Carbonell, "Pileta" brook and the town itself; and also by those of Succession of Celedonio Carbonell; and having shops for quarters, elaboration of sugar, dwellings and other appurtenances, oxen, carts, steam engine, distillery, and agricultural implements, as appears from the general inventory of the estate, which he owns in fee, on the already stated capacity, by purchase made from Don Salvador Carbonell; and declares it to have no other encumbrances than the guarantee for the sum of $10,000.00 to answer for the good management and administration of the sum of $7,000.00, amount of the heredity of the minors Rosell, of whom the aforesaid Doctor Salvador Carbonell is guardian and curator; and that of $15,000.00 placed on this same date and office, in favor of Doña Carmen Carbonell de Delgado; because although the Certificate of the annotator of mortgages for the District reports a mortgage up to 14,000 escudos executed by Lorenza del Toro, Salvador and José Ramon Carbonell, all residents of Cabo Rojo, by virtue of an instrument made in that town, to guarantee the good behaviour of Doña Josefa Carbonell, as guardian of her minor children Antonio, Josefa and Lorenza Rossell; other for 8,835 escudos for refaction made by José Eamon Carbonell, Josefa Carbonell de Rossell, Salvador Carbonell and Lorenza del Toro de Carbonell, in favor of Gutierrez and Lloreda as shown by an instrument executed in Mayaguez on June 28th, 1867; other made by Doña Juana Josefa, Don Salvador and José Ramon Carbonell, himself, in favor of Don Celedonio and Doña Carmen Carbonell, as shown by an instrument executed in Cabo Rojo on April 16th, 1879, amounting to $40,000.00, value of the shares that the latter had in said estate and which they sold, reserving to themselves the right of dominion until they should be wholly paid, together with 6% as interest per annum up to April 1st 1872, and 9% per annum from that date up to the end of the seven years within which the payment was to be made; other made by Don José Ramon, Doña Josefa and Don José Salvador Carbonell in favor of Don Fed-
11 erico Carbonell amounting to, as shown by an instrument executed in Mayaguez on December 18th, 1869, $20,000.00

with ½ per cent monthly interest up to May, '73, and 9% per annum, that is to say, ¾ per month from that date on; other made by Don Salvador Carbonell, promising, as shown by an instrument executed in Mayaguez, 8th, 1883, to be responsible for any liability which might ensue in the transaction pending on that date, as shown by private document, between the firm Nadal & Co., and Don Felipe Cuebas, the latter as substitute general agent of the partnership doing business in London under the name of Moses, Levy & Co.; other made by Don Salvador Carbonell in favor of Don Luis Bravo, for the purpose, as stated in an instrument executed in Mayaguez on July 16th of present year, of guaranteeing the supply of goods for refraction of the said estate "Carmelita," the former acknowledging to be indebted to the latter prior to the execution of the instrument in the sum of $3,793 with 1% interest over that sum and over, other advances to be afterwards made by Bravo; other made by Don José Ramon Carbonell, as shown by instrument dated 2nd, 1849, executed in Cabo Rojo, whereby he promised to pay to his son Celedonio the sum of 50 cents per day and to give him any other necessary sums while the latter is a cadet of the Disciplinary Militia of this Island; and other made by Don José Salvador, Don José Ramon and Doña Josefa Carbonell, promising to pay, as shown by an instrument executed in Mayaguez, to Don Manuel Dávila, the sum of $8,200.25 with 6% annual interest, in four instalments due on the month of June of each of the years 1870 to 1873; these incumbrances are cancelled, the first by virtue of that one now placed on the estate, to answer for the good management, by Salvador Carbonell, of the property of the minors Rossell, that passed to him as guardian after the guarantee for that purpose had been placed; the 2nd and 6th, as shown by a certificate of the Annotator of that office for the District, issued yesterday and which, together with the other certificate referred to, are attached to the conveyance and sale executed by the grantor with Don Salvador Carbonell, this same date and Notary, as to which I certify; the 3rd by an instrument also executed on this date and Notary, by the executor of the
12 will of Don Celedonio Carbonell; and by virtue of the fact that the said Don Salvador Carbonell confessed, in the cancelled instrument, to have received the sum for which the mortgage was made in favor of Doña Carmen Carbonell, whose grantee he was, as shown by a public instrument also executed before me to-day, by Don Federico Carbonell in favor of his grantee; the 5th, by virtue of the aforesaid conveyance and sale executed by the grantor with Don Salvador Carbonell, whereby the transaction pending between the two firms in whose favor it has been placed, it was ended; the 7th, it is naturally canceled, Don Celedonio Carbonell not being a Cadet of Militia any longer, for which purpose the guarantee was placed; and the 8th, and last, that is to say, that in favor of Don Manuel Dávila, by virtue of the so often cited conveyance and sale, the holder of the credit, through assignment, Don Blas Nadal, as representative of Nadal & Co., so declared it; he asserts that the estate in question has no other incumbrances than those already stated to secure the heredity of the minors Rossell and to answer for the credit of 15,000 pesos in favor of Doña Carmen Carbonell de Del-

gado; and he promises not to place any other charge to the prejudice of this instrument of which he wishes and consents that note be taken in the office of the District, within the legal term, as to which I advised the parties, to be declared void in default thereof.

And the said José Ramon Carbonell confessed to have received the sum of $2,000, to him delivered during this act by Don Felipe Cuebas; and he accepted the present instrument in all its parts, as being in conformity with everything agreed upon. This instrument was totally read to the parties, and instrumental witnesses, namely: Francisco Alvarez, Juan de Jesús Graniela and Alfredo Gonce, who declared to have no objection to be witnesses and credited their personalities with the proper schedules of public security which they exhibited and I returned, issued by the local authority on the 5th, 20th and 26th of February last past, Nos. 7,176, and 141 respectively; and after advising them of the right they all had
13 to read it for themselves, which they did, it was ratified by the said parties who sign; and to all this I solemnly swear.—F. Cuebas—José R. Carbonell—Signed—Pedro M. Martinez.

It is an original copy of its registry to which I refer, and which remains in the protocol of public instruments executed before me in the present year, on paper of third seal; and I leave note at the margin of this first copy, which I issue in four sheets of paper, first and last, bearing the illustrious seal, and the other two bearing seal of third class; and I sign and subscribe in Cabo Rojo on the 19th day of the month and year of its execution. I swear—Pedro M. Martinez.

Notice of the mortgage imposed is taken under number 204, folio 100 back, 3rd Vol. of rustic estates under my charge, corresponding to the town of Cabo Rojo, as to which I certify. San German, October 20th, 1875. Juan O'Neill.

Notice of the mortgage placed on the urban estates is taken under No. 56, folio 25, 1st Vol. of Annotations, to my charge, as to which I certify. San German, October 20th, 1875. Juan O'Neill.

By an instrument executed on this day before me, as Notary of the College of the Territory, residing in this village, Don José Ramon Carbonell, married, of full age and a resident of Cabo Rojo, transferred to Don José Maria Monge, of this City, all and every one of the rights and actions that he might have on the estate conveyed to him by his brother, named "Carmelita," situated within the jurisdiction of Cabo Rojo, and barrio de Bajura; which said actions and rights spring from the contract of October 7th, last past, executed before the Notary of Cabo Rojo, for the sum of Four Thousand Five Hundred pesos which he confesses to have received from the transferee. Mayaguez, March 30th, 1876. Carlos Bonilla.

NOTE.—By an instrument executed before me, on this 6th day of April, 1877, Done Felipe Cuebas, assisted by Done José Maria Monge, as transferee of José Ramon Carbonell, of the credit expressed by the mortgage obligation dated October 7th, 1875,
14 a first copy of which is hereinbefore attached, and with the consent of said Monge, sold and conveyed 50 cuerdas of land,

they being a part of the estate "Carmelita," to Don Federico Carbonell, as to which I swear. (Seal.) (Sgd.) Carlos Bonilla.

COMPLAINANT'S EXHIBIT "B."

Filed April 6th, 1904.

Number Two Hundred and Twenty-nine.

In the Village of Mayaguez, on December 21st, 1875, before me Don Carlos Bonilla, Notary and resident of same and of the College of the Capital of this Province; and witnesses to be stated at the end; appeared Don Eugenio Cuebas y Suarez, married, of full age, proprietor and a resident of this village, as shown by his personal schedule, issued on March 6th, last past, under No. 48, which he exhibits and I return; I swear as to his acquaintance, and he, asserting to be in full use of his civil rights, free administration of his property and necessary legal capacity to execute; and in his character of Att'y in fact and agent of his legitimate son Felipe Cuebas y Arredondo, a resident and merchant of the United States of America, which powers, as stated by himself, the latter granted to him to enter into all kinds of contracts and execute all instruments, and specially those similar to the present one, which power was granted him in the Notary now in charge of Don Santiago Palmer, about the year 73 or 74; he swears that it is neither revoked, suspended nor limited in any way or manner whatever, but on the contrary, it has been ratified by recent instructions, and specially by those for the execution of this instrument; said:

That on the City of London, United Kingdom of Great Britain, on November 25th last past, before William Webb Wenn, Junior Notary Royal and Public of same, an instrument was executed by his principal and Messrs. Moses, Levy & Co., of that City, to wit:

An assignment of credit and sale of the estate "Carmelita," in favor of the aforesaid Don Felipe Cuebas, who, to guarantee the unpaid balance of the purchase price, placed a special and express mortgage over the said estate, as extensively shown by the first copy of the said instrument, that the appearing produces and offers, and which literally copied is as follows: (There is a seal at the margin) Record No. Seventy-Four—Testimony—Transfer of credit and conveyance of estate, with mortgage obligation—In the City of London, United Kingdom of Great Britain. On November 25th, 1875, before me, William Webb Wenn, Junior, Notary Public and Royal of same, duly sworn and in practice by virtue of sovereign authority, with the witnesses to be stated, in this, my Notary, situated in Pope's Head Alley No. 2, Cornhill, in the aforesaid City; appear: as party of the first part, Messrs. Assur Henry Moses, Moses Henry Moses, Arthur Abraham Levy, Edward Levy and Alfred Marston, the latter by his Attorney Assur Henry Moses, who represents him during his absence, as shown by powers granted on April 17th, 1872, which he showed and I returned; all residents

and merchants of London, partners doing business under the firm name of "Moses, Levy and Company," which open office is in Technich street, Nos. 5, 6 & 7; and as party of the second part, Don Felipe Cuebas, born in Mayaguez, Island of Porto-Rico, a merchant and resident of the United States of America, who shows me his passport of foreigner, duly issued and showing all legal requisites, and which I returned.

All declare themselves to be married, except the fourth and fifth of the parties, who are bachellors, of full age; and all asserting to be in full enjoyment of their civil rights, free administration of their property and having sufficient legal capacity to execute this instrument of transfer of credit and conveyance of land, with mortgage obligation, state: That by these presents, and in the most solemn manner, they stipulate and mutually agree as follows:

1st. Messrs. Assur Henry Moses, Moses Henry Moses, Arthur Abraham Levy, Edward Levy and Alfred Marston, the latter
16 by Assur Henry Moses, who, to abbreviate, will be hereon named "the grantors," in their personal names, and in those of their heirs, executors, and assignees, cede, renounce and convey, from to-day for ever more, in favor of Don Felipe Cuebas, his heirs, executors and assignees (who will be named the grantee) the credit for $32,000.00, current money of Porto-Rico, which is to them due from Mrs. Elisa Dávila, legitimate wife of Domingo Gigante, a resident of Añasco, as shown by a mortgage instrument executed in the Notary of Pedro Maria Martinez y Rivas, of the village of Mayaguez, on May 25th last past, which credit has been assigned to them by Messrs. Nadal & Co., of same village, by virtue of an instrument of assignment executed in Mayaguez on October 18th, of the present year. Therefore, they make an irrevocable and absolute grant to him of all their rights, actions, privileges, advantages and profits, and give him authority to collect, claim and receive for himself, either judicially or privately, from the said Lady or from whom might do so, the amount stated in the instalments fixed by the aforesaid instrument, of October 18th, last past; granting the proper receipts for the sums so received, with evidence of delivery; and power to bring, if necessary, any proper suit, before the proper Courts, doing and practicing in them every necessary matter, as they will give them the fullest power to do so, and that he may dispose of the thing granted at his will, they grant him authority without limitation, with free and frank general administration thereof, power to substitute, revoke and reflect; they appoint him curator and actor in his own cause, and business, placing in their instead, degree and character with legal subrogation; it being well understood that for him, and not for the grantors, risk and charge, remains any delay or failure to collect the said sum of $32.000.00; the grantors, however, asserting the debt to be true, this transfer to be legitimate, and that they have not transferred it to any one before this date, and they promise not to do so, nor to revoke this
17 grant, neither whole or in part, and if they should do so, that same fact would hold it more firm, approved and ratified in all its parts.

2nd. The grantors, really and effectively transfer and convey to the "grantee" the estate "Carmelita," situated in the Municipal term of Cabo Rojo, and Barrio of Bajura; measuring four hundred cuerdas of land, more or less, partly planted of canes and the rest of pasture and marsh; its shops, sugar establishments and steam machine and evaporators, peons' quarters, hospital, bruised canes stores, carts, oxen, bridges, agricultural implements, distillery, and rum establishments and all machine appurtenances and others necessary to elaborate the fruit of the farm; which is more fully detailed in the inventory by them delivered to the grantee and by the latter confessed to have been received; and their boundary lines are as follows: It is limited by lands belonging to Federico Carbonell, heirs of Manuel Ramirez, Zenon Betances, Nolasco Vega, Rafael Bello, Fabian Ramirez, Rafael Rivera, Fernando Rodil, José Ramon Carbonell, "Pileta" Brook, and the town, also by properties of Succession of Celedonio Carbonell, which lands belong legitimately and of absolute property to them, by purchase made through an instrument of sale executed on October 7th, of the present year before Don Pedro Maria Martinez, Notary Public of Cabo Rojo.

3. Also jointly with this grant, the grantors transfer to the grantee all the rights, actions, rights of egress and ingress, uses, usages, easements, permissions, responsibilities, mortgages, incumbrances, and any others that may belong either by right or in fact to the estate "Carmelita" and its appurtenances. The grantee in his personal name and in that of his heirs, executors and assigns accepts the sale hereby executed, with all its inherent responsibilities, incumbrances and mortgages; and as a consideration for this conveyance, he binds himself and promises to pay to the grantors the net sum of Thirteen thousand pounds Sterling, current money of England, in the following instalments, to wit: One thousand pounds sterling, on the last day of February, 1876, Two Thousand pounds sterling on the last day of July, 1879; Two Thousand pounds sterling, on the last
18 day of July, 1880, Two thousand Pounds Sterling, on the last day of July 1881; Three thousand Pound- Sterling, on the last day of July, 1882; and Three Thousand Pounds Sterling, on the last day of July 1883. The grantee promises to make the payments at the respective times they fall due, through bills of exchange or any other negotiable instruments, bearing the date of the last day of the month agreed upon, and being negotiated at three months' sight on English houses or of the Continent of Europe, having a reliable credit.

4th. The grantee hereby places and the grantors accept a mortgage upon the said estate "Carmelita" and its appurtenances, real and personal, for the sum of Thirteen thousand Pounds Sterling and therefore the grantee declares and confesses to be indebted to the extent of the said sum of Thirteen thousand Pounds Sterling, which he promises to pay in the instalments already stated; without giving raise to any suit or question whatever, and in case that it should so happen, he will be liable to the creditors for all costs, damages, injuries, interests or prejudices that to them may ensue, and he, directs that he be compelled to fulfill his agreement by all force of

law and most through the summary proceedings. And that it may be so properly executed, without the general obligation, prejudicing the special, nor vice versa, but that the grantors and the grantee may have use of either, according to their choice, he mortgages and encumbers specially and expressly, the estate "Carmelita," measuring Four Hundred Cuerdas more or less, situated in the ward of Bajura, Jurisdiction of Cabo Rojo, Island of Porto Rico, limited by properties belonging to Federico Carbonell, heirs of Manuel Ramirez, Zenon Betances, Nolasco Vega, Rafael Bello, Fabian Ramirez, Rafael Rivera, Fernando Rodil, José Ramon Carbonell, "Pileta" Brook, and the town; and also by those of Succession of Celedonio Carbonell; and having buildings for quarters, elaboration of sugar, dwellings and other appurtenances, oxen, carts, steam engines, distillery, agricultural implements as more fully detailed in the general inventory of the estate, of which he is the owner, by virtue of
19 the agreement executed in the present instrument. It is also agreed that at failure to pay any due instalments, the grantors shall have the right to foreclose and execute the estate in question and to exercise every other right of reivindication granted by the mortgage law to the grantors of real property, the price of which has not been fully paid up; the grantee, also binding himself, to consider the mortgage herein given as first, and privileged mortgage after the date of this instrument; and not to encumber the said estate to a greater amount than the actual one, that is to say, over Thirteen Thousand Pounds Sterling, and Forty-Five Thousand Pesos, already placed over the same; in favor of Don Ramon Carbonell, to the extent of Twelve Thousand Pesos; in favor of Doña Carmen Carbonell de Delgado, to the extent of Fifteen Thousand Pesos; in favor of Nadal & Co., to the extent of Eight Thousand Pesos; and in favor of Don Salvador Carbonell, to the extent of Ten Thousand Pesos in his character as guardian and curator of the minors Rossell, to answer for the good administration and management of the sum of $7,000 to which the heredity of the minors and nephews Don Antonio, Doña Josefa and Doña Lorenza, Rossell y Carbonell, amounted, as shown by mortgage obligation recognized in an instrument executed in Cabo Rojo on October 7th, of the present year, before Pedro Mari aMartinez, Notary Public; and that the grantee acknowledges and accepts, as already stated; it being however understood, that after some of the incumbrances have been paid up, he will have power to place new mortgages provided that they shall never exceed the actual amount; and lastly, to satisfy without delay the taxes and imposts placed by the Government and the Province as soon as they are becoming due every year, renouncing, in case of execution against the estate, to all their rights of preference, by virtue of any expense or advance that they may have made during the three years prior to such execution; to better, or in any other way make use of the estate, its appurtenances and fixtures.

5th and last. The expenses and costs incurred in this country by reason of the present instrument shall be paid by the grantors and the others caused by recording, mortgage, real property, tax, and any others shall be paid by the grantee.

20 This instrument having been wholly read to the parties and witnesses, Antonio de Montoro, Antonio Maria Capurro and Alfred de Cornwey, as to whom I swear I know, who declared to have no objection to be so; and all having been advised of the right they had to read it for themselves, which they did, it is confirmed and ratified by said parties in all its parts; after having promised to bind all and each of themselves to do what to them respectively concerned and to mutually answer for any damages or costs ensuing from any claim contrary to this agreement by any of them advanced; and all signed, as to which I swear—Assur Hy. Moses—Arthur A. Levy—Alfred Marston per his Attorney Assur Hy. Moses—F. Cuebas—Witnesses: Antonio de Montoro—Arturo M. Capurro—Alfred de Cornwey—Moses H. Moses—Lord Alterly—W. Webb Wenn, Jr.—Not. Public—There is a seal with six waxes—O. K. to legalize the foregoing signature and seal, and which seem to be those used in official acts by Mr. William Webb Wenn, Junior, Notary Public of this City, and on whom, as such, full faith and credit is rested—London, November 26th, 1875—P. O. The Vice-Consul—Teodomiro Avendaño—There is a seal—Number Four Hundred and Thirty-Seven—Fees: $10.00—Art. 133"—

This is a true copy of the one exhibited, to which I refer,

And as the appearing party, Don Eugenio Cuebas y Suarez, considers as convenient, to the rights of his principal, that the instrument of transfer of credit and conveyance of property should appear in full in the regular protocol of this Notary, either for the purpose of having its title recorded at the nearest Registry, the estate "Carmelita" being situated within the jurisdiction of Cabo Rojo, or for the purpose that by means of Notarial Act, Mrs. Elisa Dávila de Gigante should have proper notice of the transfer in favor of Felipe Cuebas, inserted in that instrument; and by the present document and in the manner provided by law, he so declares it, after ratifying and confirming everything herein contained of the inserted instrument; dated November 28th last past, and which, through notice of this execution he has demanded from the concurrent in order that, as far as it refers to the express mortgage placed upon the said estate, in favor of the grantors, the proper notice be taken
21 in the Annotation Office of San German, and as far as it refers to the transfer of the credit against Mrs. Dávila, the proper inscription be made in the Collecting Office of the District of this Village; because, for the ends already stated and following the instructions of his principal, is that he executes this instrument of ratification for all legal purposes, and he binds all his principal's property for its exact fulfillment, stability and firmity, according to law. The executing party and instrumental witnesses Don Mateo Vera, Mateo de Peña, and Don Manuel Acacio Diaz, of this residence, to whom I know, took advantage of the right granted by law, to read this instrument for themselves; Mr. Cuebas thereupon ratifying its contents, and signing together with the witnesses, who have no legal objection to be so. As to all of which I swear—Eugenio Cuebas—Mateo Vera—Mateo de Peña—Manual A. Diaz—Signed:

Carlos Bonilla—By an instrument executed on February 26th, '77, the sum of $12,000.00 constituting two instalments payable on the years '80 and '81 were transferred, as shown by the mortgage instrument executed by Doña Elisa Dávila, which said sum of $12,000.00, as already stated, were transferred to Elami, Borda & Co., as to which I swear—Bonilla—By an instrument executed before on this day, Don Felipe Cuebas transferred to Don Federico Carbonell fifty cuerdas, a part of the estate "Carmelita"; as full payment of his mortgage credit amounting to $13,000.00. Mayaguez, April 6th, 1877—Bonilla—By an instrument executed before me today, September 11th, 1882, Don Felipe Cuebas y Arredondo, assigned for value received, to Don Blas Nadal y Cuebas, the sum of $22,700.00, that is to say, the sums of $22,000.00, as balance of his credit against the estate "Elisa," shown by the instrument of which this note is placed at the margin, together with $2,700.00 more, also as balance of the same credit by him represented through assignment made to him by the partnership Nadal & Co., by virtue of an instrument executed on October 18th, '75, forming the whole total of
22 $22,700.00, amount of the assignment to Don Blas, by the instrument stated at the beginning of this note. As to which I swear,—Bonilla—Don Santiago Rosendo Palmer é Irizarry, Notary of the Territorial College of Porto-Rico, and General Archiver of the protocol of the District; I swear: that the foregoing is a good and true copy of the original that under Number 229 is filed at the Protocol of Public instruments of the year of 1875, formed by the Notary Don Carlos Bonilla, to which I refer. And that it may be delivered to Mrs. Josefa Padilla y Urrutia, legitimate wife of Don Felipe Cuebas and his general Agent, I issue the present first copy, which I sign and subscribe in a sheet, seal 1st, and 6th of the eleventh leaving the proper note at its registry, at Mayaguez on May 7th, 1892—Signed: Santiago R. Palmer—There is a seal.

I, the undersigned Scrivener—certify: That the foregoing testimony is a good and true copy of the original of its contents, part of the record in the foreclosure suit filed by Doña Irene Cuebas de Monge, against Don Felipe Cuebas, as to collection of dollars, interests and costs, to which I refer. That it may so appear and in order to detach the original and leave the present Copy in its place, as ordered, I issue these presents, which I sign in San German on May 21st, 1892.

BENITO FORÉS.

COMPLAINANT'S EXHIBIT "C."

(Filed April 6th, 1904.)

Number One Hundred and Seventy-Seven.

Assignment of rights and actions, executed by Don José Ramon Carbonell to José Maria Monge.

In the Village of Mayaguez, on March 30th, 1876, Before me Don

Carlos Bonilla, a resident and Notary of same, and of the College of the Territory, and present, the witnesses to be mentioned at
23 the end, appeared: José Ramon Carbonell, married, merchant, forty-three years old, and a resident of Cabo-Rojo, as shown by his schedule issued under No. 22 and dated February 23rd last past; which he now exhibits and I return; I swear as to his acquaintance and he declaring himself to be in full enjoyment of all his Civil rights, and having the free administration of his property and sufficient legal capacity to execute any kind of agre-ment, stated: that Don Felipe Cuebas, of this vecinity, as legal representative of Moses, Levy & Co., of London, promised to pay, by an instrument executed before the Notary of the said town of Cabo Rojo, Pedro Maria Martinez, on October 7th, 1875, to the appearing party as one of the creditors of the Estate "Carmelita," which the aforesaid Cuebas, as such representative, acquired from Doctor Salvador Carbonell, a brother of the party, the sum of Twelve Thousand Pesos, current money; of which the executing party received Two Thousand pesos at the time of the execution of the said instrument on October 7th last; whereby Cuebas promised to pay him the sum of Four Thousand Five Hundred Pesos on March of the current year, as balance of the aforesaid credit; it being an expressed and fixed condition of the agreement, that if the present month should come and the said sum of Four Thousand Five Hundred Pesos were not paid, the sum of Two Thousand Pesos already paid to him, would remain to the benefit of the stating party; who should have the right to collect from Cuebas or his principal, the Twelve Thousand Pesos, to which his credit amounts, by action against the Estate "Carmelita"; as fully shown by the original copy of the aforesaid instrument of October. 7th, last past, which together with the proper copy of the present contract he delivers to the assignee that he may use them, whereever how and when he may see it fit; and whereas, he has agreed to assign to José Maria Monge, of this vecinity, all the rights and actions appearing in the instrument referred to, by the present instrument and as it may seem best, states: That he cedes, renounces and as-
24 signs forever, in favor of the said Don José Maria Monge of this vecinity, all the rights and actions appearing from the aforesaid Contract of October, 7th, 1875, so many times referred to.

Wherefore, he confers upon the assignee the fullest and clearest power to do, collect, claim and receive, all that it may result from that execution, doing and practicing any necessary acts, agencies, or steps, for which purpose he cedes and assigns to him all the actions and rights personal, real, profitable, direct, mixed, executive and any others that may be proper and assignable; and appoints him Curator and actor of his own cause and affair; putting him in his place, degree and preference, with due legal subrogation; it being on his account and not on the assignor's any breach or uncertainty that may result in the carrying out of those rights and actions, which he assigns for the sum of Four Thousand Five Hundred Pesos, current money; which he confesses to have received from the assignee to his satisfaction and content; whereon he executes in his favor the proper effective receipt and safety, renouncing to the laws as to delivery,

proof and term; it being however understood that the assignor does not warrant the eviction and guarantee nor the solvability; as the contrary has been agreed upon; he only assures that these rights and actions are true, that this assignment is in good faith, and that they had not been formerly assigned or ceded; and promises not to do so, nor that he will revoke partially or wholly the present instrument, and if so done by him, that it should be considered by that mere fact as ratified and more valid and subsisting; whereof his property shall legally answer. Present, the assignee Don José Maria Monge, married, of full age, merchant, and a resident of this vecinity, as shown by his personal schedule No. 49, which he presents and takes back in this act. I swear as to his acquaintance and he, declaring himself to have the legal requisites to agree and contract; after reading thereof, accepted this document in all its parts, confessing to have received the original copy to which this instrument refers. I, the authorizing Notary, advised the parties and instrumental witnesses of the right they had to personally read this instrument, which they did by literally reading it and ratified all its contents, as being stated in the manner and form agreed upon; and that it may so appear, they sign together with the witnesses, to wit:—Don Adolfo Folidura—Don Fernando Ferrer and Don Pedro Tolosa, all of this vecinity, to whom I know, and who declare to have no legal disqualification; as to all of which I solemnly swear: José R. Carbonell—J. M. Monge—Pedro Tolosa—A. Polidura—J. Ferrer—Signed: Carlos Bonilla.

This is a good and true copy of the original instrument, that under number already stated, is filed in the protocol, of the year 1876, of the Notary, formerly of Don Carlos Bonilla, now under my charge, and at the request of Doña Irene Cuebas y Arredondo, I issue this copy which I sign and subscribe on three sheets of paper, leaving a proper note at its Registry.

Mayaguez Jan. 28, 1904.

[Stamp and seal.]

LCDO. MARIANO RIERA PALMER.

COMPLAINANT'S EXHIBIT "D."

Filed April 6th, 1904.

Last Will and Testament Executed by José Maria Monge y Arredondo on January 26, 1901, Mayaguez, P. R.

Number Seventy.

In the City of Mayaguez, at three o'clock P. M., on January 26th, 1891, before me, Don Santiago Rosendo Palmer, é Irizarry, Notary of the College of the Territory of Porto-Rico, a neighbor and resident of the said City, present the instrumental witnesses: Don Luis Bravo, Don Francisco Basora y Artacho, and Don Federico Basora y Rafart, of full age, and resident of this City, who assert not to be

within any of the cases determined by Arts. 681 and 682 of the Civil code. Appear

At his home, to which I was requested to go, by reason of his being sick, Don José Maria Monge y Arredondo, fifty years old, a born resident of this City, Treasurer of the Caja de Ahorros of same, and a legitimate child of Don José Maria and Doña Petra,
26 both deceased. He exhibits and I return his personal Schedule of sixth class, issued in the current year, under No. 197. The witnesses declare that they know the testator, and that they consider him, in this act, with sufficient capacity to make his will, because his mind is clear, his memory is good, and his talking is fluent. And by these same reasons, I, the Notary, am also of the opinion that Mr. Monge has the necessary legal capacity to make his will. Therefore, he, having declared himself to be a catholic Apostolic Roman, executes his testament in my presence and that of the witnesses who see and understand him, in the manner prescribed by the following clauses:

Status.

First. He asserts to be married for the first and only time with Doña Irene Cuebas y Arredondo, from whom he has had no issue whatever.

Apportations.

Second. That there were no apportations of any kind to the marriage, and therefore, the property now held, consisting of credits to his favor, correspond- to the society of acquisitions; his wife and administrators to be named having notice thereof.

Appointment of Heirs.

Third. He, having no direct heirs, voluntarily appoints and names as his universal heir, his very esteemed wife Doña Irene Cuebas y Arredondo, that she may enjoy whatever belongs to the testator, without any restriction or limitation, as proof of the love he has for her.

Executors.

Fourth. The testator appoints as executors of his will, his said wife Doña Irene Cuebas, y Arredondo, and his friends Don Pedro F. Ruiz, Don Martin Travieso and Don Arturo Bravo y Gonzalez, joint and severally in the enumerated order. They shall execute the testamentary dispositions without any judicial intervention, that is, extra-judicially, in the manner and form to be designatedd by his wife and universal heir.

27 Revocation.

Fifth. Although he has executed no other testamentary disposition, any other, with a date prior to the present, that may afterwards be found, is hereby declared void.

Such is the testamentary disposition executed by Don José Maria Monge y Arredondo, before me and in the presence of the witnesses already cited.

I invited him, as well as them, to read this testament, a right which they waived, wherefore, I, the Notary, wholly and slowly read it to them in a loud voice; whereupon the testator, declaring its contents to be in conformity with his intention, signed it with the witnesses, as a proof thereof.

And, I, the Notary, swear as to the facts, that all the aforesaid formalities have been fulfilled in a single and continuous act, without interruption whatever, that he knows the testator, and as to everything else contained in this public instrument, which I sign, and subscribe affixing my rubric.—J. M. Monge—L. Bravo—Fec. Basora—Signed: Santiago R. Palmer—

This is a good and true copy of its original, that under the head number is filed at the protocol of the year 1891, of this Notary, to which I refer. And that it may so appear, and on request made by Doña Irene Cuebas Arredondo, widow and heiress of the testator, I issue the present copy, which I sign and subscribe in two sheets, I leaving the proper note in its registry. Mayaguez, January 28th, 1904.

[Stamp & seal.]

LCDO. MARIANO RIERA PALMER.

COMPLAINANT'S EXHIBIT "E."

(Filed April 6th, 1904.)

I, Lcdo. Don Francisco Pelegrí Roger, Municipal Judge of the City of Mayaguez:

Certify: That at folio 388. Vol. 12, Sect. of deaths, of 28 this Civil Registry to my charge, there is an inscription, that copied is as follows:

Number 193—Jose Maria Monge y Arredondo—In the City of Mayaguez, at eight o'clock A. M., on March 12th, 1891, before Don Antonio Blanes, Acting Municipal Judge, and Don Francisco Azuar, Secretary, appeared Don Pedro Montoya, born in Añasco, in this Island, of full age, married, and resident of the ward of "Salud" stating: that Don José Maria Monge y Arredondo, fifty years old, born in Mayaguez, married to Doña Irene Cuebas, born in this City, and both residents of the ward "Candelaria," legitimate son of Don José Maria and Doña Petronila, the former born in Cumaná, Venezuela, and the latter from Santo Domingo, both deceased; had died yesterday at 3 o'clock P. M., of chronic paludism, complicated with tuberculosis of the lungs; he having previously executed a last will and testament, before the Notary of this City, Don Santiago Rosendo Palmer é Irizarry; and that he gave notice as an acquaintance of his. Thereupon and by virtue of the Doctor's Certificate then presented, the Hon. Judge ordered that this act be issued and that the body be burried in the Cemetery of this City. The witness were

Francisco Azuar y Freyre and José V. Llanas of this city. After this act was read, the seal of this Court was affixed and the Hon. Judge signed it, together with the informant and the witnesses; as to which I certify—There is a seal. Antonio Blanes—Pedro Montoya—Francisco Azuar, Jr.—José V. Llanas—Francisco Azuar.

This is a good and true copy of its original, and at request of Don Rosendo Matienzo Cintron, I issue these presents, in Mayaguez, on May 7th, 1892. Francisco Pelegrí—Rafael Mangual Secretary. (Seal.)

29 COMPLAINANT'S EXHIBIT "F."

(Filed April 6th, 1904.)

Power of Attorney.

DON FELIPE CUEBAS Y ARREDONDO
to
DOÑA JOSEFA PADILLA Y URRUTIA.

Number Three Hundred and Ten.

In the City of Mayaguez, on April 1st, 1892, before me Don Santiago R. Palmer, é Irizarry, a resident and Notary of same, and of the College of the Territory of Porto Rico, and witnesses to be mentioned at the end, appear- Don Felipe Cuebas y Arredondo, forty eight years old, married, proprietor, and a resident of the town of Cabo Rojo, having a personal schedule of fifth class, No. 3, issued in the present year, which he exhibits and I return.

I swear as to his acquaintance, profession and residence, and he assures to be in full enjoyment of his civil rights; and having to my judgment the sufficient legal capacity to execute the present instrument of power, states: That he gives and confers all his power, as full, general and sufficient as required by law, and as necessary to be valid to his legitimate wife Doña Josefa Padilla y Urrutia, of full age and a resident of the town of Cabo Rojo, with the faculties enumerated in the following clauses:

First. To administer the property owned by the grantor, and those he may acquire later on, collect the rents and profits and do any other acts and transactions necessary for such administration.

Second. To lease said property for the times, prices and under such conditions that she may think fit, and to eject and throw out the tenants and occupants, when she may think it proper.

Third. To collect all debts owing the grantor, whatever their nature and procedure; and to grant receipts and letters of payments for the sums collected and received; and to cancel the mort-
30 gages and embargoes placed upon the estates of his debtors or guarantors.

Fourth. To deliver and tender the things, properties, sums or effects that the grantor is bound to so deliver or pay, and specially

the sum of Twelve Thousand Pesos, for which he is indebted to Doña Irene Cuebas, in her character as heiress of Don José Maria Monge, amount of the mortgage placed, as shown by an instrument dated October 7th, 1875, before the then Notary of Cabo Rojo, Don Pedro Maria Martinez y Garcia, upon the estate "Carmelita," owned by the grantor, the said mortgage credit having been acquired by Don José Maria Monge by virtue of an instrument dated March 30th, 1876, authorized by the then Notary of this City, Don Carlos Bonilla, it being well understood that no matter the time elapsed, his grantee shall make no objections nor exceptions of any kind whatever to the payment of the said sum of $12,000.00 and its legal interests; as the said has not been paid by virtue of extensions of time prayed by the grantor on each successive year ever since the whole sum became due, up to a short time before the death of the said Don José Maria Monge, who had voluntarily granted them, on condition that the mortgage given as guarantee for the said credit, should subsist and should remain in all its force and validity at all times.

Fifth. To demand accounts from all those bound to render them to the grantor; examine them, approve or reject them and to receive or pay the resulting amounts.

Sixth. To transact all credits, actions and rights, either active or passive, belonging to the grantor, in the manner she may see it fit; and submit her decision to the judgment of arbitrators or amicable adjusters, and to third parties in case of disagreement, and bind herself to the judgment by them pronounced.

Seventh. To accept, simply or by means of inventory, all the legacies and heredities testated or intestated, corresponding to the grantor; appoint depositaries, experts and computers, ap-
31 prove the inventories, valuations and divisions; and take possession of the property to him adjudged; granting the proper instruments.

Eighth. To sell, transfer, exchange and give in payment or as compensation any rustic or urban estate, choses in action, mortgage credits, or any other rights belonging to the grantor, for the prices and on the conditions, either suspensive, resolutory or of any other kind, that she may see fit; granting to that effect any public or private instrument, sufficient in law, as to validity and binding power.

Ninth. To give or receive as a loan, any cash amount or negociable things; and to receive the interests, and specify the proper times and conditions; collect or pay the principal and the interests when they become due; signing promissory notes, private documents, or to execute instruments of real or chattel mortgage, which she shall receive or deliver, as the case may be.

Tenth. To demand the preventive annotation of property, real and personal, either as legatee, creditor, refactioner or in any other character for the grantor; and to change those annotations into final inscriptions, cancelling any of them when proper.

Eleventh. To promote, before the Municipal Courts or Courts of First Instance, expedientes to justify the possession of real property, of which the grantor should have no title inscription; and to pro-

ceed with them up to its termination and inscription in the Registry of the Property.

Twelfth. To mortgage any rustic or urbane estates and real rights belonging to the grantor, in order to guarantee the fulfilment of the contracts executed by virtue of the powers herein conferred.

Thirteenth. To consign in public instruments, containing all legal requisites and proper clauses, all the contracts by her entered into and all the obligations by her contracted; if she thinks it convenient or is so demanded by the opposite party.

32 Fourteenth. To appear before the Municipal Judges in cases of settlements and oral trial filing the suits she may think it just and object to those brought against the grantor; accepting the settlements agreed upon or the judgment rendered if she thinks them proper, pray to declare them void or appeal if prejudicial.

Fifteenth. To also appear before the Courts, Municipal Courts and other competent Tribunals and Authorities, in all civil, criminal, jurisdictional, contentious, administrative cases, and governmental expedientes, and any others in which the grantor may have some interest; to sue and defend and to file complaints, answers, and all kinds of motions, to offer witnesses, documents and any kind of proofs; pray for summons, notices and notifications; to move for garnishments, attachments, levies, public sales, and auctions of property; challenge, object to, waive, and hear orders, decrees, judgments, and sentences; accept the matters favorable and appeal from those prejudicial; to pray and sue writs of error, move to declare void, take appeals and any others by her thought proper; following all things, matters and suits to their termination; doing and practicing all acts and diligences proper to be done by the grantor were he present; and to that effect he grants her this power without limitations whatever.

Sixteenth. To grant, in the name and representation of the grantor, powers of attorney, either general or special, in favor of the person or persons she may think fit; no matter for what purpose; appoint curators with the necessary faculties, in the cases that such appointments should be necessary; and to delegate the present powers either in whole or in part, on some reliable persons; to revoke said powers and substitutions when she considers it fit; and the grantor promises that he shall consider as valid and binding everything done and executed by his said wife Doña Josefa Padilla y Urrutia; by virtue of the powers herein granted; either by herself, or by means of the substitutes by her appointed; making no objections for any cause or pretext whatever.

He so executes it in my presence and that of the instrumental witnesses, Don Pedro J. Castro, and Don Juan B. Rivera, both
33 residents of this City, after wholly reading it and advising them of the right they had to *to* do so for themselves; thereupon the grantor signs it together with the said witnesses; as to all of *of* which, I, the Notary, swear.—Felipe Cuebas—Pedro J. Castro—J. B. Rivera—Signed: Santiago R. Palmer.—This is a good and true copy of the original power, that under No. 310, is filed at the

regular protocol of public instruments of this Notary to my charge, to which I refer.

That it may so appear and on demand made by Doña Josefa Padilla y Urrutia, I issue this copy, which I sign and subscribe on a sheet, seal 6th, and 2nd of the eleventh; leaving the proper note at its registry, in Mayaguez, on May 7th, on the same year of its execution. (Seal.) (Signed) Santiago R. Palmer.

Filing and Entering of Defendant Felipe Cuebas' Appearance, May 2nd, 1904.

United States District Court, District of Porto Rico.

No. 144.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

To the Clerk of said Court:

Please enter my appearance on behalf of myself, one of defendants in above entitled suit.

(S'g'd) FELIPE CUEBAS, *Pro se.*

Entry Order Book, Mayaguez Division, May 2nd, 1904.

#144. In Equity.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

Appearance of Felipe Cuebas.

Now comes Felipe Cuebas one of defendants herein, and
34 enters his appearance pro se.

Decree Pro Confesso.

Filed July 11th, 1904.

And Entry Order Book, Mayaguez Division, July 11th, 1904.

Eq. #144.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

Decree Pro Confesso.

It appearing that the Subpœna issued in this cause was duly and regularly served upon Francisco Antongiorgi on the 25th day of

March 1904, by delivering to and leaving with his wife, an adult person who is a member and resident in the family of Francisco Antongiorgi, one of the defendants named therein, near Yauco, in said district, an attested copy of said Subpœna, and that said Subpœna, was duly and regularly served on the 23rd day of March 1904, on Felipe Cuebas y Arredondo, one of the defendants herein, by delivering to and leaving with said Felipe Cuebas y Arredondo, at Mayaguez (playa), in said district, an attested copy thereof, and that the said Subpœna was duly and regularly served on the 24th day of March, 1904, on El Banco Territorial y Agrícola, by delivering to and leaving with Luis Rubert, Vice-President and Acting President of said Bank, personally, at San Juan, in said District, an attested Copy of said Subpœna, and it appearing that said service was made on each of said Defendants, Francisco Antongiorgi, Felipe Cuebas y Arredondo, and El Bamco Territorial y Agrícola, more than twenty days before the return day of said writ, and it further appearing that said defendants, and each of them, have appeared at the May 1904 Rule Day of this Court, but each and all of them have failed to answer, plead or demur, in accordance with the rules of equity and of this Court: Now, therefore, on motion of Horton & Cornwell, Solicitors for Complainant, it is ordered that the Bill of Complaint in said cause be taken pro confesso as to said defendants named, according to the Rules in such cases made and provided.

HORTON & CORNWELL.

35 *Answer of Defendant Banco Territorial y Agricola.*

(Filed March 3rd, 1905.

IRENE CUEBAS Y ARREDONDO
vs.
FELIPE CUEBAS Y ARREDONDO et al.

The Answer of the Defendant, the Banco Territorial y Agrícola.

This defendant now and at all times saving to itself all and all manner of benefit of exception or otherwise that can or may be taken to the many errors, uncertainties and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

I.

That it is true, as set out in paragraph I of the said bill, that the said firm of Moses, Levy & Company, were, on the said seventh day of October, 1875, seized and possessed, of the said estate "Carmelita" therein set out and described, and that it is also true that the said mercantile firm acquired the said premises by a deed of conveyance from the said Salvador Carbonell, as in the second Paragraph of said bill is set out, as therein alleged, except that the

said claim or lien of the said José Ramon Carbonell amounted to twelve thousand (12,000) pesos of the money at that time current in Porto Rico, and not twelve thousand dollars ($12,000) as in the said bill set out.

That it is also true that the said mercantile firm of Moses, Levy & Company, acquired said tract of land subject to the said lien in favor of the said José Ramon Carbonell, and that it promised to pay in settlement and payment thereof the sum of $ Two Thousand dollars ($2,000) in cash, and the further sum of four thousand five hundred dollars ($4,500.00) in the month of March of
36 the year 1876, all as in said paragraph II of the said bill set out.

II.

That it is also true as set out in said bill of complaint, that the said mercantile firm, and the said defendant Felipe Cuebas as the agent and attorney thereof, mortgaged the said tract of land to the said José Ramon Carbonell to secure the payment of the said two thousand dollars ($2,000.00) in gold and American silver, and the said four thousand five hundred dollars ($4,500.00) in American gold and silver; and that it is not true that the said whole debt was twelve thousand dollars ($12,000.00), but that it is true that the same was in money current at that time in Porto Rico.

III.

That it is true as set out in said bill of complaint as in paragraph IV thereof, that the said mercantile firm of Moses, Levy & Co., did, on the twenty-fifth day of November, 1875, sell and convey the said tract to the said defendant Felipe Cuevas; and that it is further true that the said Cuevas at said time assumed to pay the said debt of twelve thousand (12,000) pesos, and without interest thereon as in the said bill alleged.

IV.

That it is also true, as set out in paragraph V of the said bill, that said José Ramon Carbonell did transfer and convey unto said José Maria Monge his said mortgage credit of twelve thousand (12,000) pesos (not dollars), and that thereafter the said José Maria Monge was the owner of the said credit.

That it is true as set out in paragraph- VI and VII of said bill, that the said José Maria Monge died testate, and that the complainant herein, Irene Cuevas y Arredondo became his sole and universal heir.

V.

This defendant says that while it is true the said Felipe Cuevas y Arredondo did, as in paragraph VIII of the said bill of complaint alleged, execute to his wife Josefa Padilla y Urrutia in the
37 year 1892 a power of attorney wherein he stated that it was his will and wish that the said mortgage to secure the said sum of twelve thousand (12,000) pesos, (but without interest) should be and continue a valid and subsisting lien upon the said

tract of land, that it is further true that said power of attorney was not at any time inscribed in the office of the Registrar nor put upon record in any other manner, nor brought to the notice of this defendant before the execution by the said Felipe Cuevas to this defendant of either of the mortgages hereinafter set out. That it is further true that this defendant advanced the money which its said mortgages were executed to secure, to the said Felipe Cuevas, without any notice and in total ignorance of the execution of said power of attorney to the said Josefa Padilla y Urrutia, and that it was not a party to the same, and is not bound by the recitations thereof.

VI.

That this defendant is not informed whether any part of said mortgage to secure the said sum of twelve thousand (12,000) Pesos in favor of the said José Ramon Carbonell was at any time ever paid to the said Carbonell or to the said José Maria Monge, or to the complainant herein, and that as to the same asks that complainant be left to such proof as she may be able to produce in substantiation of the allegation contained in paragraph IX of the said bill of complaint.

VII.

This defendant says that the said mortgage in favor of the said José Ramon Carbonell was executed long prior to the establishment of the present system of registry of land titles in Porto Rico, and that notwithstanding the requirements of law that all liens or other encumbrances upon real estate should be carried forward to the books of the present registry on or before July, 1894, that no such note or entry or notice of said lien or mortgage was at any time ever brought forward or noted or entered on said books of said present registry, either of the said José Ramon Carbonell, the said
38 José Maria Monge, or by the complainant herein, prior to the said month of July 1894, nor since that time. That by reason of said failure to not- the same upon said books the said lien became and was subject to cancellation, and that on or about the fourteenth day of November, 1904, the Registrar of property of San German entered upon the books in his charge a note to the effect that the said mortgage in favor of the said José Ramon Carbonell was cancelled and annulled, and the said estate freed from any lien in connection with the same or to secure the payment thereof.

VIII.

That thereafter, to wit, on the second day of April, 1904, the Registrar of Property at said San German, made an entry upon the books in his charge showing that the said estate of "Carmelita" was free, for the reasons hereinbefore set out, from any charge or lien in favor of the said José Ramon Carbonell or those persons claiming under him. That by reason of said two entries said tract of land became absolutely and totally discharged of any lien in favor of either the said José Ramon Carbonell or of the said José Maria Monge, as his assignee, or in favor of the complainant herein as sole heir and

legatee of the said José Maria Monge, and that no such lien now exists, or is enforcible in a Court of equity; and further, that by reason of the same the lien to secure the payment of the money advanced by this defendant to the said Felipe Cuevas, as hereinafter set out, became and was, until the same was foreclosed, a first and only lien upon the said estate.

IX.

This defendant further says, that said mortgage in favor of said José Ramon Carbonell was never at any time inscribed or registered on the books of either the old or the new Registry of Property, but that the sole and only mention of the same contained on the said old records, is the recital contained in the conveyance by the said firm of Moses, Levy & Company to the said Felipe Cuevas.

39

X.

That on the third day of June, 1896, said Felipe Cuevas, then the sole and exclusive owner of said tract of land, produced to this defendant certificates from the Registrar of Property showing that the said tract of land was free from all encumbrances, except one for ten thousand (10,000) pesetas on a part of the same, which was afterwards cancelled and released; and that on the face of the said certificates and the representations of the said Felipe Cuevas, and the fact that the books of the said Registrar of Property showed the said tract of land to be free from encumbrances, and in absolute and entire good faith and belief that there were no encumbrances on the same except the said lien to secure said ten thousand (10,000) pesetas, this defendant lent the said Felipe Cuevas the sum of Twenty thousand dollars ($20,000.00) and took from him to secure the payment of the same a first mortgage on the said tract of land, which said mortgage was afterwards on the sixth day of June, 1896, duly inscribed in the Registry of Property at said San German; and on the sixth day of June, 1896 the said Registrar of Property again certified to this defendant that said tract of land was free from encumbrances, except to secure the ten thousand (10,000) pesetas.

XI.

That the said Felipe Cuevas did not pay said sum when due; and that thereafter, to wit: on the second day of April, 1901, he executed a new mortgage to secure the payment of the same and all charges incidental thereto, which said mortgage has been since said time, by reason of the default of the said Felipe Cuevas, foreclosed by this defendant and said property sold at public sale and bought in by this defendant.

That by reason of the facts stated this defendant is now the legal owner and seized in fee of the said tract of land with all its appurtenances, free from claims of all kinds.

Wherefore, this defendant having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of

complaint material to be answered, according to its best
40 knowledge and belief, humbly prays this honorable Court to enter its judgment that this defendant be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as this honorable Court may think it is entitled to.

(Signed) BANCO TERRITORIAL Y AGRICOLA,
Defendant.

By R. CASTRO CANALES,
Its Managing Director.

[Stamp: Secretary's Office of the Bank San Juan, P. R.]

Entry Mayaguez Order Book, May 20th, 1905.

Eq. #144.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

Comes Henry F. Hord, one of the Solicitors for the defendant Banco Territorial y Agrícola and files "Withdrawal" as such solicitor and attached thereto a consent by the defendant Bank for said Withdrawal.

Withdrawal of Counsel.

(Filed May 20th, 1905.)

Equity. No. —.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

Withdrawal of Solicitor.

Comes Henry F. Hord, one of the Solicitors for the Banco Territorial y Agrícola, one of the defendants herein, and prays *lief* of the Court to withdraw from longer representing the said Bank.

He attaches hereto the written consent of the said Banco Territorial y Agrícola to the said Withdrawal.

(Signed) HENRY F. HORD.

Equity. No. —.

IRENE CUEBAS et al.
versus
FELIPE CUEBAS et al.

41 *Consent to Withdrawal of Counsel.*

The Banco Territorial y Agrícola, defendant in the above numbered and styled cause, hereby consents that Henry F. Hord, Esquire, should withdraw from further representation of it in this case, and hereby consents that an order to that effect be entered herein by the Court, forthwith.

San Juan, Porto Rico, May 19th, 1905.

(Sgd.) THE BANCO TERRITORIAL Y AGRICOLA,
By R. CASTRO CANALES, *Its Managing Director.*

Motion of Defendant Bank for Leave to Withdraw Answer and File Plea to the Jurisdiction.

Filed September 24, 1906.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

Motion.

Now comes the Banco Territorial y Agrícola, one of the defendants above named, by its Solicitor, T. D. Mott, Jr., and moves the Court for an order permitting the said defendant to withdraw the answer heretofore filed by it in the above entitled cause together with the answer tendered for filing by it in said cause, and instead thereof to file a plea to the jurisdiction; which said plea is herewith exhibited and is the same in every respect as a like plea heretofore filed in said cause by said defendant, but overruled by the Court.

(Sgd.) T. D. MOTT, JR.,
Solicitor for said Defendant.

42 Journal Entry, San Juan, October 1st, 1906.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

Now comes T. D. Mott, Jr., solicitor for the defendant "Banco Territorial y Agrícola" and calls up the Motion of said defendant for permission to withdraw its answer and for leave to file a plea to the jurisdiction. Comes also B. J. Horton, one of the Solicitors for

the Complainant, and opposes said Motion. Said plea is ordered to be filed, and further action thereon postponed until the Court reconvenes.

Plea to the Jurisdiction.

(Filed October 1st, 1906.)

Equity. # 144.

IRENE CUEBAS Y ARREDONDO
vs.
FELIPE CUEBAS Y ARREDONDO et al.

Plea to the Jurisdiction.

The Plea of the Banco Territorial y Agrícola, One of the Defendants Herein, to the Bill of Complaint Herein Filed Against it.

This defendant, by protestation, not confessing nor acknowledging all or any of the matters and things in the said Bill of complaint herein contained and mentioned to be true, in such sort, manner and form as the same are therein set forth and alleged, especially appearing under protest for the purposes of this plea to the jurisdiction and no other, for plea to the whole of said Bill of Complaint, says:

1. That this Court ought not to further take cognizance of the said bill of complaint because this defendant says that at the time of the filing of the same the Complainant herein was and still is a citizen of the Island of Porto-Rico and resident of the same and
43 this defendant was and is a corporation organized and doing business under and by virtue of the laws of said Island of Porto-Rico and was and is a citizen of the same, and each and all of the other defendants herein are citizens and residents of the said Island of Porto-Rico, and that therefore this is a suit by and between citizens and residents of the said Island of Porto-Rico, of which this Court has no jurisdiction.

(2) That, as shown by the said Bill of Complaint, the jurisdiction of this Court over and of this suit is sought to be maintained not by reason of any Federal question being involved herein, but solely and only by reason of the alleged diverse citizenship of the parties herein and hereto and that as shown by the allegation of the said Bill of Complaint, the defendant is alleged to be a citizen of Spain and another of the defendants, to wit: Felipe Cuebas y Arredondo, is alleged to be a citizen of the United States of America and another of said defendants, to wit: Francisco Antongiorgi, is alleged to be a citizen of Porto-Rico, and that therefore it affirmatively appears by the allegations of the said Bill, if the same are true as therein alleged, that this is a case of which this Court has not jurisdiction.

All of which matters and things this defendant is ready to verify.

Wherefore this defendant pleads the same to the said bill of com*al*int herein, and insisting upon its exemption from suit in this Court, says that not this Court but the District Court of either the District of Mayaguez, Porto-Rico, or that of the District of San Juan, Porto-Rico, has jurisdiction in the premises, and prays the judgment of this Honorable Court whether it should be compelled to make any other or further answer to the said Bill and prays that it may be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

(Sgd.) T. D. MOTT, JR.,
Solicitor for Said Defendant.

44 UNITED STATES OF AMERICA,
District of Porto-Rico, ss:

Rafael Castro Gonzalez being first duly sworn, deposes and says, that he is the manager of the Banco Territorial y Agrícola of San Juan, Porto-Rico, defendant in the above entitled cause, and that the foregoing plea is not interposed for delay and that the same is true in point of fact.

(Sgd.) R. CASTRO GONZALEZ.

Subscribed and sworn to before me this 26th day of September, 1906.

H. H. SCOVILLE, *Clerk.*

San Juan Journal Entry, June 1st, 1907.

144, Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

The Court hands down an opinion herein and in accordance therewith orders that all proceedings heretofore taken in this case be, and they hereby are, set aside, and the cause allowed to stand on the bill as originally filed, but dismissed as to Antongiorgi, and the plea first filed shall be properly verified, whereupon the cause will be ready for a hearing upon the question of jurisdiction.

Opinion and Order for Speedy Issue as to Jurisdiction.

(Filed June 1st, 1907.)

Eq. # 144, Mayaguez.

IRENE CUEBAS Y ARREDONDO, Viuda de Monge, Complainant,
vs.
FELIPE CUEBAS Y ARREDONDO et al.

45 Opinion and Order for Speedy Issue as to Jurisdiction.

This is a bill in equity filed in the Mayaguez District, on March 22, 1904. It is for the foreclosure of a mortgage said to have been

kept alive from some time in 1875, in Spanish days, when it was given on a tract of land or estate called "Carmelita" containing 410 cuerdas, situated in the barrio of Bajura, municipality of Cabo Rojo in Porto-Rico. It ought to be a simple proceeding and should have gone to final decree within the ordinary period provided for under the rules, but such seems not to have been done. Instead, a large amount of what we hope counsel will pardon us for characterizing as useless pleading has been indulged in, and the cause stands to-day no nearer a finality than it was immediately after service was had three years ago.

To particularize, it appears, as stated, that the cause was filed March 22, 1904. May second thereafter H. F. Hord and Juan Guzman Benitez entered their appearance for respondents. June 4th, respondent Banco Territorial y Agrícola pleaded to the jurisdiction, and although that was answer day, yet no other answers, pleas or demurrers were filed by any respondent. July 11 the Complainant took the bill as confessed against all respondents, two of them not having answered at all, and the plea of respondent Banco Territorial y Agrícola not being properly signed under the equity rules. November 29th, 1904, a stipulation was filed that the bill amended by striking out the designation of citizenship of the respondent corporation and that the decree pro confesso be set aside and respondent Banco Territorial y Agrícola be allowed to properly sign its plea "which should be withdrawn," and it was given thirty days within which to answer.

March 3, 1905, the answer of the Bank was filed. March 29th thereafter the bank by its counsel Messrs. Hord and Benitez filed a demurrer to a petition for an injunction that it appears had been filed in the meantime. April 3, 1905, exceptions to the answer of the bank were filed. April 14, 1905, the demurrer to the application for an injunction was sustained, and the application denied.

April 24, 1905, exceptions to the answer were set down for
46 hearing. May 20, 1905, H. F. Ford withdrew as solicitor for the respondent Bank. May 27, 1905, a Motion of the Bank for leave to amend its answer was filed. June 2, 1905, the first three exceptions to the said answer were overruled and the remaining ten sustained by the Court. June 9, 1905, the cause was set down for hearing on bill and answer. On June 15th of the same year the bank, by Messrs. Benitez and Coll y Cuchi, the latter being new counsel, filed a petition for a rehearing on the Court's ruling as to the exceptions. June 19, 1905, the respondent bank was given a month to file a brief in support of its petition for a re-hearing. December 11, 1905, a brief having been filed, on the subject by opposing counsel in the meantime, the Court denied the petition for a re-hearing as to the matter of the exceptions.

On March 5, 1906, the respondent bank tendered an amended answer and moved for leave to file the same. September 24, 1906, the respondent Bank again, this time by new counsel, T. D. Mott, Jr., filed a motion for leave to withdraw its answer, and for permission to file a plea to the jurisdiction similar to the first plea filed in the case. October 1, 1906, the plea was allowed to be filed under

objections by solicitors for complainant. January 18, 1907, complainant dismissed as to Francisco Antongiorgi, on the ground that he was a nominal and unnecessary party, and had no real interest in the case, and finally in February, 1907, the Court being unable to determine from the conflicting contentions of counsel the exact condition of the matter in the short time at its disposal when holding Court at Mayaguez, took the whole matter under advisement for examination as to the status of the pleadings. Counsel then each filed briefs in the premises and in this manner the matter is now before us.

We have examined the record paper by paper and read the same with a view to ascertaining what the condition is.

As the suit was originally filed on the face of the bill this Court certainly had no jurisdiction to entertain it, because the complainant was alleged to be a porto Rican, and the respondent Antongiorgi was also alleged to be a citizen of Porto Rico. This latter
47 fact is perhaps the reason why counsel for complainant after the holding of this Court in the now somewhat well-known Valdecillo-Bertran case, dismissed as to the respondent Antongiorgi, because he was an unnecessary party. But notwithstanding this, we see from the files that the first plea to the jurisdiction which was filed on June 4, 1904, and is sworn to, sets out that the respondent the Banco Territorial y Agrícola is a corporation organized and doing business under the laws of Porto Rico and was and is a citizen of the same and resident of the said Island, and that because no federal question is involved the Court was without jurisdiction to entertain the cause.

At some stage of these proceedings we will have to render a final decree that will be expected to bind some one and fix property rights, and when the Court is asked to do that, it ought to know that it has jurisdiction. We are not satisfied that jurisdiction in fact exists. Therefore we feel constrained to disagree with both counsel and the arguments made in their briefs herein, and to order, which we now do, that all proceedings heretofore taken in this cause necessary for that purpose, be set aside and held for naught, and the cause stand on the bill as originally filed but dismissed as to Antongiorgi, on the issue raised by the first plea filed as aforesaid, which will be considered as re-filed after proper verification and standing for that purpose, on which plea complainant must at once join issue, and thereafter, if it shall be determined that the Court has jurisdiction, it will call for a new, concise and proper answer in the premises, and for immediate issue thereon without any more dilatory pleading, to the end that the whole matter may be disposed of. It would not become us to again assert our annoyance at so much useless and dilatory pleading, although it is manifest that counsel in this case have indulged in an abundance of it.

The Supreme Court of the United States has repeatedly held that it is the duty of a Court of the United States, whether the question is

raised by counsel or not, to take cognizance of the lack of its
48 own jurisdiction at any time, and refuse to proceed in a cause where it has no power in the premises. Mansfield & Ry. Co. v. Swann, 111 U. S. 379—Parker vs. Ormsby, 141 U. S. 48, Perez vs. Fernandez, 202 U. S. 100, and cases cited. The Northern Securities Company case in particular supports at length the proposition we are here contending for and lays down the law so emphatically in that regard as that, so long as the law remains as it is, no subordinate United States Court will, we think, have the temerity to disobey its mandate. A proper order to comply with these views will be entered and notice thereof given to respective counsel.

San Juan, P. R., May —, 1907.

(Sgd.) B. S. RODEY, *Judge.*

San Juan Journal Entry, July 31st, 1909.

#144, Mayaguez.

IRENE CUEBAS
vs.
BANCO TERRITORIAL Y AGRÍCOLA.

On this day the Court files an Opinion on the issue on the plea to the jurisdiction heretofore duly submitted, and in accordance therewith it is:

Ordered that the said plea be, and the same hereby is, overruled, and the respondents required to answer, but:

Because of the absence of counsel for respondent in the United States, the time to answer is hereby extended to November 1, 1908, or to within five days after the sooner return to Porto Rico of T. D. Mott, Jr., Esq., Counsel for the respondent Bank.

Opinion.

(Filed July 31, 1908.)

#144. Equity. Mayaguez Division.

IRENE CUEBAS
vs.
BANCO TERRITORIALLY Y AGRÍCOLA.

This cause has been pending since March, 1904. We filed an Opinion in the matter with reference to the pleadings on
49 June 1, 1907, (See 3 P. R. Fed. 68) wherein we enumerated the proceedings up to the time. Notwithstanding the views there expressed, counsel for respondent on June 28, 1907, filed an additional plea, but this was stricken out at the hearing on April 4th, 1908, thus leaving the issue as raised by the prior plea of

June the 4th, 1904, which goes to the jurisdiction of the Court for alleged lack of diverse citizenship.

On July 9, 1906, we held in the Valdecillo-Bertran case (2 P. R. Fed. 46) that under existing law as to this Island, where Porto Ricans appear as parties on both sides of any suit, this Court is without jurisdiction in the premises. Shortly after this decision complainant in the case at bar dismissed as to all respondents, save El Banco Territorial y Agrícola, which in the complaint is alleged to *to* be a Spanish Corporation. The plea now being considered traverses this allegation and asserts that the respondent is a Porto Rican commercial association or business entity, and that hence as the Complainant is alleged to also be a Porto Rican, there exists no such diversity of citizenship as would give this Court jurisdiction, and that hence complainant's remedy, if she has any, must be sought in an Insular Court.

Owing to the peculiar status of Porto Rico, and the unique situation of this Court, so many controversies regarding jurisdiction keep arising and take so much time, and result in such delay, as that at times we almost question the wisdom of establishing a Court of this character in a dependency or a territory, and some times feel that perhaps it would be better for all concerned if the judicial branch of such a government was modeled on that of New Mexico and Arizona where questions of jurisdiction based on diverse citizenship cannot arise at all.

The matter here in issue is in a measure stare decisis, as to this Court, because a question that would appear to be practically similar, was passed upon by a former incumbent of this bench in
50 Borrero vs. Luz Electrica Co. (1 P. R. Fed. 142) where it was held that:

"A Corporation organized in a dependency or province of Spain by Spanish authorities, is a creature of the Spanish Government. The Corporation has the citizenship of the sovereignty that creates it and its incorporators are presumed to be citizens of the State creating it."

We also had occasion ourselves to pass upon certain phases of citizenship of associations, limited partnerships, joint stock companies, etc., in the case of Santana vs. Marquez & Co., 2 P. R. Fed. 271, where we held that:

1. The diversity of citizenship necessary to give the Court jurisdiction exists in a suit by a citizen of Porto-Rico against a partnership organized under the laws of Porto Rico, whose members are citizens of Spain.

2. Such a partnership is neither a corporation nor such a joint stock association that the jurisdiction of this Court can be predicated upon its supposed citizenship.

3. Such a partnership has no citizenship for jurisdictional purposes, whether general or "en comandita."

But notwithstanding all this, the facts here are so peculiar and the question involved is of such importance that we feel a further discussion of the matter will not be amiss, and specially as the decisions referred to were not appealed from.

The facts here are about as follows: In the year 1894, while Porto-Rico was still a dependency of Spain, certain parties organized the respondent Bank under the Spanish Code of Commerce which had by Royal edict some time previous been extended to Porto-Rico. The parties who organized the concern after having had many preliminary meetings among themselves, went before a Notary and set forth that they did so under Section 117 of that Code, and,
51 as required by the said Code, they then and there procured the Notary to draw up a very lengthy and detailed statement of their organization in the nature of what we would call a constitution and by-laws, and filed the same as required, in the local commercial Registry.

They fixed the time the concern had to run at 75 years. It appeared that at such time eighty-two share holders appeared before the Notary who drew up the statement and that they held proxies for enough additional share holders to make a total of upwards of four hundred, and that they had been duly empowered at a meeting previously had to represent practically all concerned for the purpose of organizing. The instrument set forth that the actual subscribers were at that time more than 3,000 in number, and that more than half the capital stock, as required by the Code, had been paid for. The Headquarters of the institution was fixed at San Juan, P. R., and so far as we can learn, was even then entirely local to Porto-Rico, and has remained so ever since, doing no business and having no connection with the Peninsula of Spain, save such as any bank in Porto-Rico may have in the way of collections and the buying and selling of exchange. The concern did not have the right to issue currency, but issued under the law, shares payable to bearer, which were transferable by assignment, save in a few instances temporarily as to the officers of the concern. There was it seems at this same time a regular national royal Spanish bank in Porto-Rico, with an exclusive right to issue currency, but this latter was created by direct royal decree, while no royal decree or edict of any kind was issued to this respondent, nor was its creation in any manner approved by the local Governor General or any other person, it being organized apparently simply under the Commercial Code of the Island. It is said that this same commercial code under existing law was continued in Porto-Rico after the establishment of American Civil government here, and that practically all the provisions under which this concern was organized are now in force under American occupation, but as to this we are expressing no opinion. The concern in so
52 far as we can see, has all the essential attributes of a corporation as known to us in the States of the Union. It has a President and all other necessary officers. It enjoys succession under the terms of its organization and by reason of the transferable character of its shares of stock. We cannot find that it possesses a common seal, but we never could see what real essential necessity there was for that ancient common law insignia as to corporate entities in the States of the Union. The Code under which this concern is organized characterizes it as a "commercial association," and under

such law it is made a commercial entity that must sue and be sued under the name it adopts.

The puzzling question before us is, what is this concern at the present time in Porto-Rico? It is a joint-stock company, or a full-fledged corporation, and does that question make any difference as to our jurisdiction? Is its nationality at the present time Spanish or Porto-Rican? Did all such corporations in Porto-Rico cease on the change of sovereignty, or did they remain Spanish corporations with their existing property rights and the right to continue to do business protected by the Treaty of Paris? Or on the other hand did such a concern as this become at once on the change of sovereignty a Porto-Rican commercial concern or association? It is admitted that in and of itself, it has done nothing since the date of its organization under the Spanish regime, in Porto-Rico or elsewhere to change its status. That it has taken out no new charter,—if there is in fact any law in Porto-Rico under which that could be done, which we are not now deciding, under or since American Occupation of the Island and has taken no license or other leave to continue to do business, but has continued its business without change.

Counsel for complainant well states in his brief that: "it may be admitted at the outset that the situation is unique and that the law reports will be searched in vain for a decision upon similar
53 facts."

Complainant of course contends that as corporations are creatures of the sovereignty that creates them,—this concern is still a Spanish association or corporation, and that hence the necessary diverse citizenship to give this Court jurisdiction exists. In reply counsel for the respondent bank claims that although the concern was organized under the Spanish commercial code, during Spanish time here, still even at the date of its organization it was strictly local to Porto-Rico, and that Spain having ceded away the dependency where it was organized and alone doing business, the concern went with the cession. That it could not, if it wanted to, under the law and the Treaty retain its original citizenship if it ever had any in the personal sense. In this behalf he calls attention to the Dartmouth College case,—4th Wheaton, 518, and to the many decisions of the Supreme Court of the United States following it as sustaining his position that while the rights of the concern must be respected it retains no Spanish citizenship and that therefore it is, under the Code, a Porto-Rican commercial association or entity at the present time. That because of this the diverse citizenship necessary to give this Court jurisdiction in this case, does not exist.

We have made some considerable inquiry as to what became of the corporations that surely must have existed in Porto-Rico at the time of the change of sovereignty. We learn that some of them procured charters from some particular State of the Union, filed the same in Porto-Rico and proceeded to continue doing business. In some instances the new concern became a holding company for the rights and property of the former concern, which was then permitted to remain in abeyance,—in other instances, the new concern

simply taking over the property and rights of the old. We have been unable to ascertain to a certainty that since American occupation the Legislative Assembly of Porto-Rico has adopted any general Incorporation Law; but we find many statutes looking to the control and regulation of all sorts of corporations and assuming their existence as local concerns and otherwise. Further it is said to
54 be common knowledge in Porto-Rico that several of the supposed Spanish corporations are continuing business and are at least tacitly or directly recognized by the local authorities.

But we must not forget that the question here arises only because there is such a Court as this, into which Complainant is seeking to bring this respondent, for it is not questioned that under the Treaty all rights of the respondent can and must be protected in the local Courts.

However, notwithstanding that Courts of the United States are of special and limited jurisdiction, and that all doubts as to that question should be resolved against it, still in the light of the fact that a former incumbent of this bench, as stated, has virtually passed upon this same question, we do not think that we ought to disturb his ruling. We come to this conclusion for the further reasons that the concern was born under the Spanish law, that it appears to exercise all the necessary functions of a corporation, that nothing has occurred to change its personality since the change of sovereignty and because it is no concern of this Court on this issue whether it is continuing business in accordance with or in contravention of any local law.

Therefore, we hold that it is still a Spanish corporation and all of its stock-holders will be presumed to be Spaniards under the authority of the decision of the Supreme Court of the United States in St. Louis etc., Railway vs. James 161 U. S. 546, and cases cited.

In arriving at this conclusion we have in mind the language of Mr. Justice White of the Supreme Court of the United States in Carrozzi vs. Dastas, 204 U. S. 73, regarding the widened jurisdiction of this Court under the Act of 1901 (31 Stats. 963) wherein he said that:

"In consequence of the enlarged character of the jurisdiction conferred by that Act, and the obvious departure which it mani-
55 fests from the principles controlling the jurisdiction of a United States Court, as contradistinguished from a State Court, we do not think the rule which demarks the line between the Courts of the United States and State Courts within the removal Act should be held applicable to Porto-Rico, to the extent which might have obtained had the act of 1901 not been enacted."

The plea will, therefore, be overruled and the respondent will be required to answer, but owing to the absence of counsel for respondent in the States, time to file their answer will be given until the first day of November next, or to within five days after the sooner return to the Island of said counsel, and it is so ordered.

(Sgd.) B. S. RODEY, *Judge.*

Answer of Defendant "El Banco Territorial y Agrícola."

(Filed January 15th, 1909.)

IRÈNE CUEBAS, VIUDA DE MONGE,
vs.
EL BANCO TERRITORIAL Y AGRICOLA et al.

Answer of the Defendant El Banco Territorial y Agrícola.

This defendant, now and at all times saving to itself all and all manner of benefit of exception or otherwise that can or may be taken to the many errors, uncertainties and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

I.

Defendant denies that it is a corporation or was such at the time of the filing of the bill of complaint herein; denies that it has
56 ever, through any agents, officers or persons, or in any manner asked, petitioned or applied to any authority, government or sovereign to be granted the right or franchise to be a corporation, or has done any act or thing, to acquire or secure such right or franchise. Defendant denies that it has ever become incorporated under any law or laws or by permission of any sovereign, government or authority; denies that it is a body corporate; denies that it has any charter, articles of incorporation, or other instrument by virtue of which it acts as a corporation; denies it has ever received, or has now, any grant, charter, permission or franchise to be a body corporate, or to act as such.

But defendant alleges the fact to be that it is a joint stock company according to the laws of Porto Rico, and particularly under the provisions of the Code of Commerce of Porto Rico in the year 1894, and continues and is now acting under and by virtue of the agreement at such time executed and entered into by and between its several members.

II.

If the Court should hold and decide that defendant, "El Banco Territorial y Agrícola," is a corporation, then this defendant says that it is a citizen of Porto Rico and denies that it is a citizen of Spain, or of the United States, or of any other State or country whatsoever, because it says that it is a corporation organized and doing business under and by virtue of the laws of the Island of Porto Rico and is a resident of said Island and has its principal and only place of business therein.

Defendant further says, if it should be finally held by the Court that it is a corporation, that it was organized in the year 1894, with its principal and only place of business in the Island of Porto Rico;

that by the terms of its charter it is prohibited from having a place of business, or a habitat, or residence outside of Porto Rico, and since its organization in the year 1894 has continued to reside, and is now residing in Porto Rico and not outside thereof, and
57 has not now, nor has ever had any place of business outside of Porto Rico.

III.

That this defendant has not sufficient information or knowledge touching and respecting the allegations contained and matters set forth in paragraphs marked I, II, III, IV, V, VI, VII, VIII and IX of the Bill of complaint to enable it to answer respecting said matters or said allegations, and therefore it denies each and all of said matters or allegations.

IV.

This defendant further answering says that on the third day of June, 1896, Felipe Cuebas, one of the defendants herein, was the sole and exclusive owner of the tract, piece or parcel of land described in the bill of complaint herein, and that on said last mentioned date the said tract, piece or parcel of land was recorded and registered in the Registry of Property at San German, the same being the proper Registry wherein to register or record said property, in the name and as the property of the said Felipe Cuebas, as sole and exclusive owner of the same, free from the said lien, encumbrance, or mortgage of the complainant, and which said lien, encumbrance or mortgage it is prayed by the bill of complaint herein to be foreclosed.

And this defendant fur*ht*er says that on the third day of June, 1896, the said Felipe Cuebas, being then the sole and exclusive record owner of said tract of land, as aforesaid, made and executed in favor of this defendant, and delivered to it his certain instrument of mortgage wherein and whereby the said Felipe Cuebas expressly mortgaged the said tract or parcel of land described in the bill of complaint to and in favor of this defendant, to secure to it the repayment of $20,000.00 U. S. C., which the said Felipe Cuebas then and there borrowed of this defendant, and this defendant loaned to the said Felipe Cuebas, as will more fully appear from a properly certified copy of said instrument of mortgage which this defendant is ready and willing, and hereby offers to show and exhibit
58 unto this honorable Court whenever and wherever it is called upon or ordered to do so.

And this defendant further says that the said instrument of mortgage executed and delivered as aforesaid, was, on the 6th day of June, 1896, duly recorded and registered in the proper registry of Property, to wit: the Registry of Property at San German, Porto Rico.

And this defendant further says that at the time the said instrument of mortgage was recorded as aforesaid, the alleged mortgage, or lien, of the complainant mentioned and described in the bill of complaint herein was not registered or recorded, and did not appear registered or recorded in the modern or present books of the Regis-

try of Property in and for the District of San German at San German, Porto Rico, as an existing and subsisting lien, or at all.

And this defendant further says that on the second day of April, 1901, the said Felipe Cuebas, being indebted to this defendant, and being still the sole and exclusive owner of said tract of land, made and executed in favor of this defendant, and delivered to it, his certain instrument of mortgage wherein, and whereby the said Felipe Cuebas expressly mortgaged the said tract or parcel of land described in the complaint herein to, and in favor of this defendant, to secure to it the payment of $43,512.00 under the terms and conditions mentioned and contained in said mortgage instrument, as will more fully appear from a properly certified copy of the same, which this defendant is ready and willing, and hereby offers to show and exhibit unto this honorable Court whenever and wherever it is called upon or ordered so to do.

And this defendant further says that the last said mentioned instrument of mortgage, executed and delivered as aforesaid, was, on the — day of April, 1901, duly recorded and registered in the proper Registry of Property, to wit: the Registry of Property at San German, Porto-Rico.

And this defendant further says that at the time the said last mentioned instrument of mortgage was so recorded as aforesaid, the alleged mortgage, or lien, of the Complainant herein, was not
59 registered or recorded, and did not appear registered or recorded in the modern or present books of the Registry of Property in and for the District of San German, at San German, Porto-Rico, as an existing or subsisting lien, or at all.

And this defendant further says that by the terms of the said last mentioned instrument of mortgage, to wit: the mortgage of April 2, 1901, aforesaid, and upon the recording of the same, the mortgage of June 3, 1896, became, and was, cancelled, and annulled and of no effect, as the latter mortgage was for a part of its amount a renewal of the former.

V.

And this defendant further says that thereafter, to wit, September 2, 1904, the said mortgage of April 2, 1901, was foreclosed, and proper judicial proceedings to that end were had in the District Court in and for the District of Mayaguez, in an action instituted in said Court by this defendant against the said Felipe Cuebas, and that the said property was sold, in accordance with the decree of said Court, in favor of this defendant, entered in said proceedings, at a public and judicial sale, on October 31, 1904, and purchased at said sale by this defendant.

That this defendant then and there, by virtue of said sale, became, and is now, the sole and exclusive owner of said property, title to the same having been executed and delivered by the Marshal of the above mentioned Court by virtue of the purchase made by this defendant at the sale aforesaid, and in accordance with the terms of the decree of said Court as aforesaid; and which said title was duly recorded in the Registry of Property at San German, on the 29th day of November, 1904.

And this defendant further says that at the time of the sale and purchase aforesaid, and the recording of the title so executed, granted and delivered by the Marshal of the said Court as aforesaid to this defendant, the alleged mortgage or lien of the Complainant mentioned and described in the bill of complaint herein, was not registered or recorded, and did not appear registered or recorded in the modern or present books of the Registry of Property in and for the District of San German at San German, Porto-Rico, as an existing or subsisting lien, or at all.

60

VI.

And this defendant further says that at the time and times of the execution, delivery and recording of the two instruments of mortgage aforesaid, to wit: the mortgage of June 3, 1896, and April 2, 1901, this defendant had no notice, either constructive, actual, or otherwise, or at all, of the alleged claim, lien or mortgage of the Complainant mentioned and described in the bill of complaint herein.

And this defendant denies that the complainant has any lien or mortgage in, to, or on the said tract of land prior or superior to the title which this defendant acquired by virtue of the judicial sale aforesaid, or to any claim, right, or interest, accruing to this defendant by virtue of the mortgage aforesaid.

VII.

And this defendant, in addition to the foregoing answer, avers that the cause of action, if any there may be, arising to the plaintiff on account, or by reason of the several allegations and complaints in her said bill contained, did not accrue within twenty years nor within fifteen years before the said bill was filed, and this allegation this defendant makes in bar of the Complainant's bill and prays that it may have the same benefit therefrom as if it had formally pleaded the same.

VIII.

And this defendant, in addition to the foregoing answer, avers that the said complainant should not recover against this defendant in and by her said bill, for this defendant says that complainant has been guilty of gross laches in the assertion, enforcement, and prosecution of the alleged rights set up and mentioned in the bill of complaint herein, and this allegation this defendant makes in bar of the complainant's bill, and prays that it may have the same benefit therefrom as if it had formally pleaded the same.

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IX.

And this defendant further says, that said complainant should not now be heard to assert or claim against this defendant any cause of action, or right, by virtue of the allegations in her said bill contained, because this defendant says that the time and times the said mortgage of June 3, 1896, was about to be executed, de-

livered and recorded as has been hereinbefore stated, she, the said complainant, had full and complete knowledge that the same was so about to be executed, delivered, and recorded as a first and prior mortgage or lien, and that this defendant was about to lend the sum aforesaid to the said Felipe Cuebas, in the faith and belief that said loan would be secured by the said mortgage, and in the full belief that said mortgage was, and would in law and in fact, —a first lien; and the defendant further says that, notwithstanding the knowledge of the complainant of the facts aforesaid, she, the said complainant, utterly and completely failed to assert her alleged rights and claims mentioned in the bill of complaint until the filing of said bill, but permitted defendant to lend the above sum as aforesaid; and because this defendant further says that, notwithstanding the recording and registering of the said mortgage on June 3, 1896, as hereinbefore stated, as a first mortgage or lien, the said complainant remained and was silent concerning and respecting her alleged claims, rights, lien or mortgage set out and mentioned in her said bill of complaint until the filing of said bill; and because this defendant further says that at the time and times the said mortgage of April 2, 1901, was executed, delivered and recorded as hereinbefore stated, she, the said complainant, knew full well that said mortgage was to be executed, delivered and recorded as a first lien or mortgage, and remained completely and utterly silent concerning and respecting the rights, claims, lien or mortgage set up and mentioned in her bill herein.

62 And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill, charged; without this, there is any other matter, cause or thing in said complainant's said bill of complaint contained material or necessary to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided and denied, is true to the knowledge and belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Sgd.) BANCO TERRITORIAL Y AGRICOLA DE PUERTO-RICO.
R. CASTRO G.,
Managing Director (*Gerente*)

(Sgd.) T. D. MOTT, JR.,
Solicitor for Defendant.

Replication to Answer of "El Banco Territorial y Agricola."

(Filed February 15th, 1909.)

Equity. No. 144, Mayaguez.

IRENE CUEBAS Y ARREDONDO
vs.
FELIPE CUEBAS Y ARREDONDO and EL BANCO TERRITORIAL Y AGRÍCOLA, Defendants.

This replicant, saving and reserving to herself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the separate answer herein of El Banco Territorial y Agrícola, one of the defendants, for replication thereto, or to so much thereof as she is advised is necessary to be replied unto, says that she does and will aver, maintain and prove her said bill to be true, certain and sufficient in law to be answered unto by said defendant, and that the answers of said defendant are uncertain, evasive and insufficient in law to be replied to by this replicant; without this, that any other matter or thing in said answers contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or denied, is true; all which matters and things this replicant, is ready to aver, maintain and prove as this honorable Court shall direct, and humbly prays as in and by her said bill she has already prayed.

63

(Sgd.) F. L. CORNWELL,
N. B. K. PETTINGILL,
Counsel for Complainant.

Journal Entry, San Juan Division, May 8th, 1909.

No. 144. Equity, Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

And now on this day by consent of counsel Messrs. Pettingill & Cornwell appearing for the Complainant, and John G. Ewing, substituted counsel, appearing for the respondent, the Banco Territorial y Agrícola, this cause comes on to be heard upon the issue raised by the bill and answer as now settled, it being admitted in the absence of the papers in the case which are on file in the Mayaguez Division, that said pleadings raise the issue of the jurisdiction, and that the same depends on the citizenship of the Banco Territorial y Agrícola. And the Court hears said respective counsel at length upon said question of the jurisdiction of the Court particularly under the recent ruling of the Supreme Court of the United States in the "Asilo de

Damas case", At the end of the arguments, the Court, not
64 being fully satisfied, takes the matter under advisement, Counsel for Complainant, thereupon, suggests that, in the event of the Court holding the said Banco to be a Porto-Rican corporation, and thus ousting the jurisdiction as to it, that still complainant is entitled to a decree against the other respondents who are in default, the said Banco, as it is alleged, not being a necessary party.

Journal Entry, San Juan Division, June 7, 1909.

No. 144. Equity, Mayaguez.

IRENE CUEBAS Y ARREDONDO
vs.
THE BANCO TERRITORIAL Y AGRICOLA.

Because of the holding of the Honorable the Supreme Court of the United States in the "Asilo de Damas case" the plea to the jurisdiction herein was recently renewed, re-argued and submitted by counsel for the respective parties, and the Court now files a Memorandum giving its reasons therefor, and in accordance therewith the said plea which was overruled for reasons given in an opinion filed under date of July 31, 1908, which is now reversed, is sustained and it is therefore,: Ordered that the said cause stand dismissed with costs against the complainant without further action on the part of the Court, unless within five days from this date the bill can be so amended as to give the Court jurisdiction.

Memorandum Dismissing Cause for Lack of Jurisdiction.

(Filed June 7, 1909.)

IRENE CUEBAS Y ARREDONDO
vs.
THE BANCO TERRITORIAL Y AGRÍCOLA.

Memorandum.

This cause comes before the Court upon a renewal of the plea to the jurisdiction based upon the citizenship of the Banco Ter-
65 ritorial y Agrícola, which question was recently re-argued and submitted by counsel for the respective parties. We filed an opinion in the case under date of July 31, 1908, which can be seen in the files, holding the said Banco to be a Spanish corporation and giving our reasons for so holding. Recently the decision of the Supreme Court of the United States in the Asilo de Damas case has come to hand, and we feel that the language of the Court in the opinion delivered by Mr. Justice Moody therein is sufficiently broad to oblige us to reverse ourselves and hold that the Banco Territorial y Agrícola is at least not a Spanish corporation and that hence the jurisdiction

fails for lack of diverse citizenship. The cause will therefore stand dismissed with costs against the complainant, without further action of the Court, unless within five days from this date the bill can be so amended as to give the Court jurisdiction, and an order to that effect will be entered.

(Sgd.) B. S. RODEY, *Judge.*

Amendment of Bill, Dismissing as to Banco Territorial y Agricola.

Filed June 10, 1909.

No. —, Mayaguez.

IRENE CUEBAS Y ARREDONDO
vs.
FELIPE CUEBAS Y ARREDONDO et al.

Comes now the Complainant above named, by her Solicitors F. L. Cornwell and N. B. K. Pettingill, and, in pursuance of the permission granted by the Court in its order of the 7th day of June, 1909, conditionally dismissing said bill of complaint, hereby amend their said bill of complaint for the purpose of retaining jurisdiction in this Court by dismissing the same as to said defendant El Banco Territorial y Agrícola.

And in order to make said bill of complaint conform to such dismissal they hereby amend the same in the following particu-
66 lars to wit:

1. By striking from the same the last four lines of the preliminary paragraph of said bill in which the parties thereto are stated.

2. By striking out paragraph number X of said bill of complaint.

3. By striking out the name of said El Banco Territorial y Agrícola wherever the same appears in the prayer for relief and in the prayer for process contained in said bill.

And said bill of complaint having been heretofore amended so as to dismiss one Francisco Antongiorgi as a defendant therein and being now amended so as to dismiss the same as to said El Banco Territorial y Agrícola, complainant hereby elects to proceed with the same as against the defendant Felipe Cuebas as sole defendant.

(Sgd.) F. L. CORNWELL,
N. B. K. PETTINGILL,
Solicitors for Complainant.

Journal Entry, Mayaguez, July 12th, 1909.

#144. Equity.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

In this cause N. B. K. Pettingill, Solicitor for the Co-plainant, calls up the matter of his amended complaint recently filed herein and moves the Court notwithstanding its opinion recently filed in the cause, that all orders to the contrary if any heretofore made in the cause be set aside, and that the cause be considered as still pending as between the Complainant Irene Cuebas against Felipe Cuebas alone; and he submits that jurisdiction exists as the late Felipe Cuebas was a citizen of the United States and the Complainant a
67 Porto Rican. He thereupon requests that, as Felipe Cuebas in his life time failed to respond in the cause, a decree pro confesso was taken against him, and requests that the Court now permit the Complainant Irene Cuebas to take a final decree in the premises as of date previous to the date of the death of Felipe Cuebas, so as to avoid the necessity for reviving as against his succession, and because of the long delay in the case, and the fact that such decree pro confesso was entered several years ago against him. The Court not being fully informed takes the matter under advisement.

Opinion Denying Foregoing Application.

(Filed September 7th, 1909.)

144. Equity, Mayaguez Div.

IRENE CUEBAS Y ARREDONDO, Viuda de Monge,
vs.
EL BANCO TERRITORIAL Y AGRÍCOLA, FELIPE CUEBAS Y ARREDONDO and FRANCISCO ANTONGIORGI.

This cause is before us on a last effort of the complainant, in which she tries to induce us to grant her a decree against the now sole respondent Felipe Cuebas y Arredondo, on her bill taken as confessed against him under date of July 11, 1904.

The original bill was filed more than five years ago, on March 22, 1904. It has been one of the most persistently fought cases the docket of this Court exhibits. The useless pleading indulged in is quite voluminous, and it has again taken us more than a day to examine the same in order to get an idea of the situation. See our opinion regarding one phase of this same case under date of June 1, 1907, in 3 P. R. Fed. Reps., p. 67. See also a later opinion
68 under date of July 31, 1908, in the files, which will be published in 4 P. R. Fed. Reps.

The suit was originally brought against three respondents as above set out, but on January 18, 1907, after our opinion in the Vallecillo-Bertran case, 2 P. R. Fed. Reps. 46, it was dismissed as to the respondent Francisco Antongiorgi, he being a Porto Rican, and not an indispensable party, leaving only the two remaining respondents Felipe Cuebas y Arredondo and El Banco Territorial y Agrícola, the former being a citizen of the United States and the latter being then supposed to be a Spanish corporation. After our opinion of July 31, 1908, aforesaid, wherein we reluctantly held, under the stare decisis effect of the ruling of a former incumbent of this bench in Borrero v. Luz Electrica Co., 1 P. R. Fed. 142, that the said Banco was a Spanish corporation, although it had pleaded to the contrary, the cause remained in abeyance until the Supreme Court of the United States, on February 23, 1909, in the "Asilo de Damas" case, reversed the holding of this Court as reported in 2 P. R. Fed. 369, that corporations organized in Porto Rico in Spanish days were still Spanish corporations after the change of sovereignty. In obedience to this holding of the Supreme Court of the United States (the decision will probably be published in 213 U. S.), we called for a further hearing on the plea to the jurisdiction in the case at bar, and thereafter, under date of June 7, 1909, we filed a Memorandum holding, under force of the "Asilo de Damas" decision, that the respondent El Banco Territorial y Agrícola was at least not a Spanish corporation, and setting forth that unless within five days from that date the bill could be so amended as to give the Court jurisdiction, the case would stand dismissed without further action of the Court.

Thereafter, on June 10, 1909, the Complainant by her counsel came in and formally dismissed the cause as to the said Banco Territorial y Agrícola, and setting forth that, as the cause had theretofore been dismissed as to the respondent Antongiorgi, complainant, now elected to proceed with the cause against the sole
69 remaining respondent Felipe Cuebas y Arredondo, against whom the decree pro confesso had so been entered as aforesaid, under date of July 11, 1904, some three and a half months after the filing of the bill.

Counsel for complainant strenuously insist that on this state of pleading, their client is, without revivor, entitled to a decree against such remaining respondent, although they confess in open Court that said respondent Felipe Cuebas y Arredondo died more than two years ago. They further insist that their client is entitled to said decree to be entered as of date nunc pro tunc before said respondent's death. They further confess that the several answers filed in the cause (there were three of them) during all this voluminous pleading, show that their said client, the complainant, is not entitled to, and she is not asking for a decree holding her alleged lien to be superior to that of the respondent El Banco Territorial y Agrícola, but junior to the same, and that their client is not asserting any superior mortgage rights against the said Banco, and that all the advantage the decree asked for will be to the complainant, is that it will enable her to go into the Insular Courts and there litigate what-

ever rights she may have in and to the property in question as against the said Banco. The request is a reasonable one if it can be granted, under all the facts and circumstances of the case.

No later than last month, counsel for complainant filed a painstaking brief which we have examined with great care, strenuously insisting upon the right of their client to this decree on her unsworn bill so taken as confessed. We have examined the bill, as well as all of the pleadings in the cause, with much more than ordinary care because of this long delay and the bitterly fought contentions of the respective parties, which in a measure were excusable until the holding of the Supreme Court of the United States regarding the citizenship of corporations or associations of Spanish birth
70 now still remaining in Porto Rico, as aforesaid.

The facts in the case as gathered from the voluminous exhibits, papers, pleadings, transcripts of evidence, etc., in the files, are substantially as follows: In the year 1875, one Dr. Salvador Carbonell owned a plantation of 410 cuerdas of land known as "Carmelita," situated in the barrio of Bajura in the Municipality of Cabo-Rojo in the Mayaguez district of this Island. On October 7th of that year, said Carbonell, through the respondent Felipe Cuebas y Arredondo, conveyed said plantation to the firm of Moses, Levy & Co., of London, England, and the latter firm at once mortgaged the whole of said estate to one José Ramon Carbonell of that same district in Porto Rico, who was some relative of their grantor, to secure said gentleman in the payment of twelve thousand dollars or pesos. A few days later, on November 25, 1875, this same firm of Moses, Levy & Co., sold their equity of redemption outright to their said agent, the respondent Felipe Cuebas y Arredondo, and the latter in and by the terms of the instrument under which he received the property, assumed the payment of the debt aforesaid due to said José Ramon Carbonell. Some three months and five days after the latter transfer, and on March 30, 1876, this José Ramon Carbonell sold this mortgage of his and the credit it represented to one José Maria Monge of the same place, he being the husband of the complainant Irene Cuebas y Arredondo. On January 26, 1891, José Maria Monge made a will in and by which his said wife, the complainant Irene Cuebas y Arredondo, became his sole heir, and became entitled to administer his estate extra-judicially. Monge died one month and thirteen days later, on March 11, 1891. A year and twenty-one days after the death of Monge, on April 1, 1892, the respondent Felipe Cuebas y Arredondo, in a power of attorney he was executing to his wife Josefa Padilla y Urrutia, acknowledged that this debt of twelve thousand pesos was still due to the estate of Monge, and confesses that, no matter about the time that had elapsed, the debt was still due and subsisting and should be paid,
71 etc. Neither this power of attorney nor the meantime transfers nor the Monge will were inscribed in any registry of property, being, as it seems, simply left in the several protocols of the notaries making them. In fact it is set forth in the three answers of El Banco Territorial y Agrícola, which were filed through this litigation, that the only mention of any lien upon the property in

question, in either the old or new registries (anotadurías) of property of the said district, was its mention in the Carbonell mortgage of November 25, 1875.

If this is true, and the bill is silent on the subject,—then both the old and the new registry of property remained without containing any mention of this alleged mortgage, save as aforesaid, for over twenty years and six months, until on June 3, 1896, when the respondent, El Banco Territorial y Agrícola, without, as it repeatedly states, having any knowledge of the keeping alive of said claim, and, as it allges, on the certificate of the Registrar that said plantation was free from such claim, loaned to the said Felipe Cuebas y Arredondo upon what it says it believed was a first mortgage on the property in question, the sum of $20,000.00. It seems that Cuebas did not pay this debt, and so nearly five years later, on April 2, 1901, he executed a new mortgage to the respondent Banco, in and by which the debt was increased to nearly $44,000.00. It is also alleged in the several answers of the Banco that it had no knowledge even at the time of the receiving of this renewal mortgage and of the lending of this additional amount of money, of the existence of any claim on the part of the complainant to any lien upon the property in question.

Nor did the Banco, as it alleges, have any such knowledge on April 16, 1901, when its second mortgage was recorded in the registry, because it alleges that the registrar certified that the property was free and clear, save for a small claim of another party.

As alleged in the answers, it seems that at the time the bill here was filed, on March 22, 1904, the whole increased debt of nearly $44,000.00 from Felipe Cuebas y Arredondo to the respond-
72 ent El Banco was in default, and such proceedings were had on the part of El Banco against him as that on October 31, 1904, a judicial sale in an insular Court of the said tract of land took place, at which El Banco, itself, became the purchaser and the property was adjudicated to it under date of November 29, 1904, when its deed was recorded, and it went into complete possession. Now it must not be forgotten that at this time this Court had no jurisdiction of the Banco in this proceeding; and for that matter this Court never at any time before had, or since has had jurisdiction of that respondent.

It would seem that the remedy of the respondent, if any, then was and still is in the insular Court.

The several answers of El Banco, because of this situation insist that both the twenty year and the fifteen year statutes of limitation have barred complainant's claim, and had done so even before the Banco loaned any money at all upon the property in question, and that, independent of the running of these statutes of limitatiton, the complainant was guilty of the grossest laches, because she was a resident in the immediate vicinity during all of said time, and took no steps of any kind or character, although the Banco alleges she had complete knowledge of the loaning of the money to Cuebas, to notify the Banco or take any steps to assert her rights, if any she had, and did nothing by herself or her predecessors to assert her

rights for nearly twenty-nine years, from November 25, 1875, the date of the Carbonell mortgage, to March 22, 1904, the date of the filing of her bill.

It is of course unquestioned that wherever jurisdiction exists, any complainant has a right to choose a United States Court as a forum, and it is the settled law that such complainant need not make any one but indispensable parties respondents in the suit, if making them such would oust the jurisdiction. Equally unquestioned is the right of any respondent to object to action of the Court when it in fact has
no jurisdiction as to such party. When complainant filed
73 her bill, because of the citizenship of the respondents, the
Court certainly had no jurisdiction, but she could have immediately cured this by dismissing as to respondents Antongiorgi and El Banco Territorial y Agrícola, who it turned out were both Porto Ricans. It was probably not then generally known that with Porto Ricans on both sides of a case, the jurisdiction here was ousted. The question then is: If she had so dismissed as to all respondents save Felipe Cuebas y Arredondo and he had failed to answer, as he did, would she have been entitled to a decree?

Her bill is not sworn to, and for that matter neither were any of the answers.

After giving the matter careful and extended thought, we cannot avoid the conclusion that she is not, and never has been under the allegations of her bill, entitled to a decree. It appears from the face of the bill that the alleged mortgage claim was more than twenty-nine years old at the time she filed her suit, and under Sec. 1865, of the New Civil Code of Porto-Rico (1964 of the old Code) a mortgage action prescribed after twenty years. It might be said that this period begins to run after the mortgage is due and not after it is made, but in this case it does seem to us that her remedy in the first instance was in the insular Court, where she could have made El Banco Territorial y Agrícola a party, because it does seem to us that it certainly is an indispensable party to the controversy. If her cause of action was not in fact outlawed as against the whole world at the time she filed her bill, then surely it is not even yet prescribed as to El Banco Territorial y Agrícola, and she still has her remedy against it wherever she can sue it, because it has had full notice of her claim since the date of the filing of her bill.

Whilst at the time of the filing of her bill one of her learned counsel was a strenuous advocate of the position that the old chancery rule of lis pendens obtained in this Court in Porto-Rico, which position was held not to be the law in Romeu vs. Todd, 206 U. S. 358, a cause which he prosecuted to that Tribunal, still there is
evidence in the files which shows that the Counsel of El Banco
74 Territorial y Agrícola were notified of the filing of this suit,
and of course the service of process upon it and its strenuous battle against the jurisdiction here, which it finally maintained by aid of the ruling in the Asilo de Damas case supra, have given the Banco ample notice of complainant's rights at least since the date of the filing of her bill. In addition to this, there is evidence in the files that an actual effort was made to file a formal notice of lis pen-

dens in the registry, after the filing of complainant's bill, but it seems the registrar refused to give the same effect because it was a notice requested and signed by counsel only instead of being ordered by the Court itself.

It may be contended that the knowledge we have, which enabled us to make the statement aforesaid, is obtained in part from some of the several answers, the evidence, and other pleadings in the cause, and all of which it may be claimed has now become unofficial and immaterial in the issue that remains,—but notwithstanding this, depending upon the bill alone, we can well see that the Banco was from the very start an indispensable party to the controversy, and counsel for the complainant were certainly of the same opinion, and manifested it by joining El Banco as a respondent and making a four year battle in an effort to maintain its Spanish citizenship.

On this point as to the Banco having been an indispensable party from the beginning, we have examined with care the recent brief of the learned counsel for complainant, but it fails to change our view. We are not however admitting that we cannot take notice of the entire record before us, but insist that we can.

We have repeatedly held in obedience to what we believe is settled law, that this Court of Equity will not lend its aid to enforce stale demands. See our opinion in Llaneras et al. v. La Compañía Férrea del Oeste, 3 P. R. Fed. 83-4. See also our opinion in case No. 160, San Juan Division, Dexter v. Maria Cruz de Godines et al., to be printed in 4 P. R. Fed., and see our opinion in equity suits No. 509 and 524, Sucesion de Goenaga v. Gallardo and Sucesion
75 de Noble v. same, to be printed in 5 P. R. Fed. It does seem to us that this bill on its face, being without explanation of any kind or character for the delay of nearly twenty-nine years, does prima facie show that it is an extremely stale demand, and that the Complainant is probably, as stated in several of the answers, guilty of the grossest laches in the enforcement of her rights, if she has any. She evidently mentions the acknowledgment of the debt by Cuebas in the power of attorney given to his wife in 1892 as in some measure accounting for this delay, yet she does not allege, and it probably is not the fact, that this power of attorney was recorded in any property registry to give notice to El Banco or other intending lenders of money or purchasers. Her rights, if she has any, in our opinion cannot now, and at least since she filed her suit could not be settled without making El Banco Territorial y Agrícola a party. It has been the real party in interest certainly since 1901, some three years before the filing of her bill, if not since 1896, the time of the first loan by the Banco. At any rate if she was entitled to the relief her counsel now insist she has a right to, and will accept, that is against Cuebas alone, un-er a decree to be entered nunc pro tunc as of more than two years ago before his death, she ought to have brought the suit against him alone in the first instance, and should have enjoined the foreclosure of the bank mortgage by the summary proceedings under which it no doubt was done, instead of relying upon the lis pendens theory which the Supreme Court of the United

States has held not to be in force. The Court here is of course not responsible for this condition.

To grant her the decree she now asks for, is too dangerous a proposition; first because her demand is so stale; second, because in our opinion the rights of others may have grown superior to hers, if any she has; and third, because of the unnecessary complications which would result. The only effect of granting the decree would be to bring two courts of perhaps to some extent coordinate
76 jurisdiction, and that owe to each other proper comity, into conflict, when complainant's rights, if she has any, against El Banco, which, as stated, is in our opinion the real party in interest, are as good now as they were the day she filed her bill, and hence a tribunal where she can make that concern a respondent is her proper forum. That forum first took possession of the res and is the only one in which complainant can sue El Banco and where she can attack the summary proceeding by which it is intimated in the record the Banco's mortgage was foreclosed without due process of law.

Therefore this Court, being wholly without jurisdiction to settle the real controversy, an order will be entered dismissing the bill with costs, including the stenographer's fee of ten dollars but for the reasons stated the dismissal will be without prejudice.

(Sgd.) B. S. RODEY, *Judge.*

Decree.

Entered on Journal September 7, 1909.

No. 144, Mayaguez. Equity.

IRENE CUEBAS
vs.
FELIPE CUEBAS.

This cause having heretofore been submitted on the motion of the complainant for a decree against the now sole respondent Felipe Cuebas y Arredondo to be entered nunc pro tunc as of date prior to his death some two and a half years ago, junior to and subject to the rights of the former respondent El Banco Territorial y Agrícola, and the Court being now fully advised in that regard, sends and opinion to the files giving its reasons for its action, and in accordance therewith it is:

Ordered, adjudged and decreed that the bill of complaint herein be, and the same hereby is now finally dismissed with costs against the complainant, to include a stenographer's fee of ten
77 dollars, but for the reasons stated in said opinion, such dismissal shall be without prejudice; to which action of the Court in so refusing to grant such decree as requested, and in thus dismissing said cause, the complainant by her solicitor then and there duly objects and excepts.

Petition of Appeal.

(Filed September 7, 1909.)

No. 144, Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS.

The Complainant in the above entitled cause, Irene Cuebas, conceiving herself to be aggrieved by the final decree made and entered by this Court on this, the 7th day of September, 1909, as well as by the various orders and decisions prejudicial to her interests in the course of this cause before that time, it being adjudged by said final decree that her bill of complaint herein should be finally dismissed, does hereby appeal therefrom to the Supreme Court of the United States for the reasons to be set forth in her assignment of errors herein; and she prays that this her petition for such appeal may be allowed, and that a transcript of the record, proceedings and pleadings upon which said final decree was based, duly authenticated, may be sent to said Supreme Court of the United States.

Dated at San Juan, Porto Rico, this 7th day of September, 1909.

(Sgd.) F. L. CORNWELL,
N. B. K. PETTINGILL,
Solicitors for Complainant, Appellant.

78 *Assignment of Errors.*

Filed September 7th, 1909.

No. 144, Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS.

Comes now the complainant, by her Solicitors F. L. Cornwell and N. B. K. Pettingill, and upon her appeal to the Supreme Court of the United States from the final decree dismissing her bill of complaint in the above cause assigns the following as the errors committed by the trial Court in the course of the proceedings in said cause:

I.

The Court erred in holding that the defendant, Banco Territorial y Agrícola, was not estopped to deny the admission of its pleading that it was a corporation existing under the laws of Spain.

II.

The Court erred in holding that said defendant, Banco Territorial y Agrícola, was not a foreign corporation.

III.

The Court erred in holding that, even were said Banco Territorial y Agrícola not a foreign corporation, the Court was ousted of jurisdiction over it by reason thereof.

IV.

The Court erred in holding that said Banco Territorial y Agricola was an indispensable party of said suit.

V.

The Court erred in rendering its decree dismissing the bill of complaint.

VI.

The Court erred in not rendering a final decree in favor
79 of the Complainant as against the defendant Felipe Cuebas.

(Sgd.) F. L. CORNWELL,
N. B. K. PETTINGILL,
Counsel for Complainant-Appellant.

Journal Entry (Order Allowing Appeal).

September 7th, 1909.

No. 144. Equity, Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS.

Complainant in the above suit having now in open Court presented her petition for an appeal herein and her appeal bond with sureties in the penal sum of Three Hundred Dollars, conditioned as required by law, it is now, on motion of N. B. K. Pettingill, Esq., one of the counsel for said complainant, ordered that an appeal to the Supreme Court of the United States from the final decree herein this day entered be, and the same hereby is, allowed; and that a certified transcript of the record, pleadings and all proceedings herein, as may be indicated by said counsel for the Complainant, be forthwith transmitted to said Supreme Court of the United States; and that the bond for costs presented as above be, and the same hereby, is approved.

Appeal Bond.

(Filed September 7th, 1909.)

No. 144. Equity, Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS.

Know all men by these presents that we, N. B. K. Pettingill, as attorney for the Complainant, as principal, and R. H. Todd and F. E. Dyer, as sureties, are held and firmly bound unto
80 John L. Gay, Clerk of the District Court of the United States for Porto-Rico, and his successors in office, for the benefit of whom it may concern, in the penal sum of Three Hundred Dollars ($300), for the payment whereof, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our Seals and dated this 7th day of September A. D., 1909.

Whereas at a session of the Court aforesaid held this day the complainant herein having obtained from this Court an order allowing an appeal in this suit to the Supreme Court of the United States from the final decree whereby the Bill of Complaint herein has been dismissed, which appeal has been entered in open Court this day and during a stated Term thereof;

Now, the condition of the above obligation is such, that, if the complainant in the above suit shall prosecute her said appeal to effect, and shall answer for all costs that may be awarded against her, if she fails to make her plea good, then the above obligation is to be void, else to remain in full force and virtue.

(Sgd.)	N. B. K. PETTINGILL.	[SEAL.]
(Sgd.)	R. H. TODD.	[SEAL.]
(Sgd.)	F. E. DYER.	[SEAL.]

Taken and approved by me, in open Court, this 7th day of Sept., 1909.

(Sgd.) B. S. RODEY, *Judge.*

UNITED STATES OF AMERICA,
District of Porto-Rico:

R. H. Todd and F. E. Dyer, being duly sworn, each for himself deposes and says that he is one of the parties who has signed as a surety to the above bond, and that he is worth in visible property within this district and subject to levy under execution more than the said penal sum of Three Hundred Dollars.

(Sgd.) R. H. TODD.
F. E. DYER.

81 Sworn to and Subscribed before me this 7th day of September, 1909.

[Seal United States District Court for Porto-Rico.]

(Sgd.) JOHN L. GAY,
Clerk Dist. Court of U. S. for P. R.

Complainant's Præcipe for Transcript of Record.

(Filed September 7th, 1909.)

No. 144. Equity, Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS.

In making up the record upon the appeal taken by the complainant to the final decree herein, the Clerk of the Court aforesaid, will please include there the following pleadings and proceedings, and no others, to wit:

1. The bill of complaint filed on March 22, 1904, with its Exhibits marked with the letters "A" to "F" inclusive.
2. The appearance of defendant Felipe Cuebas, filed May 2, 1904.
3. The decree pro confesso, entered on July 11, 1904.
4. Answer of Banco Territorial y Agrícola, filed March 3, 1905.
5. Withdrawal of H. F. Hord as counsel for said defendant filed May 20, 1905.
6. Motion filed on September 24, 1906, by T. D. Mott, Jr., as counsel for said defendant, for leave to withdraw answer and file plea to the jurisdiction.
7. Order entered in Journal October 1, 1906, granting said motion.
8. Plea filed on October 1, 1906.
9. Journal entry of June 1, 1907, and opinion filed same day.
10. Journal entry of July 31, 1908, and opinion filed same day.
11. Amended answer of Banco Territoral y Agrícola, filed January 15, 1909.

82 12. Recital of filing or replication to said answer on February 15, 1909.

13. Journal entry of May 8, 1909.
14. Journal Entry of June 7, 1909, and Memo., opinion of that date.
15. Amendment to Complainant's bill, filed June 10, 1909.
16. Journal entry in Mayaguez, showing application of complainant for a final decree as against defendant Felipe Cuebas.
17. Opinion denying said application, filed September 7, 1909.
18. Final Decree, entered September 7, 1909.
19. Petition of appeal, assignment of errors, journal entry granting appeal, and appeal bond with its approval, all of September 7, 1909.

(Sgd.) F. L. CORNWELL,
N. B. K. PETTINGILL,
Counsel for Complainant.

Order Extending Time for Filing Transcript.

Entered San Juan Journal October 25, 1909.

No. 144. Equity, Mayaguez.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

Upon application of R. H. Todd, who represents N. B. K. Pettingill of counsel for the complainant, the time is extended two weeks in which to file the record on appeal in the above entitled cause with the Honorable the Supreme Court of the United States.

83 In the District Court of the United States for Porto-Rico.

#144. Mayaguez. In Equity.

IRENE CUEBAS
vs.
FELIPE CUEBAS et al.

I, John L. Gay, Clerk of the District Court of the United States for Porto-Rico, do hereby certify the foregoing Eighty-two type-written pages, numbered from 1 to 82, inclusive, to be a full, true and correct copy of the record and proceedings called for in the above and therein entitled cause by appellant's Præcipe as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the Order granting the Appeal herein.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 3rd day of November, A. D., 1909.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk District Court of the United States for Porto Rico.
By RICARDO NADAL,
Deputy Clerk.

Endorsed on cover: File No. 21903. Porto Rico. D. C. U. S. Term No. 159. Irene Cuebas y Arredondo, appellant, vs Felipe Cuebas y Arredondo. Filed November 20th, 1909. File No. 21903.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 159.

IRENE CUEBAS Y ARREDONDO, APPELLANT,

vs.

FELIPE CUEBAS Y ARREDONDO ET AL., APPELLEES.

BRIEF FOR APPELLANT.

Statement of the Case.

This suit was begun by the appellant, alleging herself to be a citizen of Porto Rico, on the equity side of the District Court of the United States for Porto Rico in the month of March, 1904, for the foreclosure of a mortgage upon the plantation "Carmelita" against three defendants: Felipe Cuebas y Arredondo, who was alleged to be a citizen of the United States and the owner of said plantation by purchase subject to complainant's mortgage; the "Banco Territorial y Agricola" (hereinafter called the bank), which was alleged

to be a corporation organized and existing under the laws of the Kingdom of Spain and a citizen thereof, and Francisco Antongiorgi, who was alleged to be a citizen of Porto Rico. The last two defendants were simply alleged in general terms to "have or claim some interest in said mortgaged premises or in some part thereof as purchasers, mortgagees, or otherwise" inferior to the lien of complainant's mortgage (printed Record, pp. 1-5). The bill was subsequently dismissed by complainant as to the last-named defendant, Antongiorgi, and no question as to his rights arises on this appeal (p. 31). Various notarial instruments probative of complainant's allegations as to the existence and record of the mortgage in October, 1875, its recognition by defendant Cuebas in 1892 and the title of complainant thereto under the will of her husband were attached to the bill as exhibits (pp. 6-23).

All the defendants were duly served with process, and defendant Felipe Cuebas also entered his appearance in person, but afterwards all the defendants allowed a decree to be entered against them *pro confesso* (p. 23). This decree was thereafter opened as against the defendant bank, which in March, 1905, was allowed to file its answer to the merits of the bill (pp. 24-28). This answer was signed by its managing director and under its seal; it contained no denial of its character and alienage as alleged in the bill and admitted all the allegations thereof, except those as to the validity of complainant's mortgage against it and the amount of the debt which it secured.

Thereafter said bank changed its counsel several times and various pleadings were interposed which do not appear in the record except as recited in one of the opinions of the judge below (pp. 31-34); but, nothing having thereby been determined, the counsel last employed by the bank obtained leave of the court to withdraw an amended answer which it had filed and to refile a plea to the jurisdiction (theretofore filed and overruled) raising the question of the proper citizenship or alienage of the bank (pp. 29-31). Upon issue joined and

evidence taken upon this plea it was again overruled, with an elaborate opinion (pp. 34-38), and defendant bank was again required to answer, which it did in due course (pp. 39-43).

This last answer of the bank denied the matter which had already been decided upon the plea, denied practically all the allegations of fact contained in the bill, merely because of lack of sufficient information to enable it to answer positively respecting them, and then alleged affirmatively that defendant Felipe Cuebas, while appearing from the registry of property to be the owner of the plantation described in the bill free from the lien of complainant's mortgage, had mortgaged the same to the bank in 1901 for some $43,000.00. The answer further alleged that in September, 1904 (*i. e.*, after said bank had been made a defendant and had appeared in this suit), it had begun in the Insular Court of Porto Rico suit against said Felipe Cuebas alone for the foreclosure of its said mortgage, had carried such suit to judgment, and had become by purchase at such foreclosure sale the full and exclusive owner of said plantation.

Replication was filed to this answer (p. 44), but upon the case being called for hearing upon the merits that court was of the opinion that under the decision of this court in Martinez *et al. vs.* La Asociacion, etc., 213 U. S., 20 (announced after the aforesaid ruling upon the plea), its ruling upon that plea had been erroneous and it was its duty to reverse it and to hold that the court was without jurisdiction because said bank was not an alien institution, and therefore one party defendant, as well as the complainant, were in effect Porto Ricans, ousting the jurisdiction under previous decisions of that court; hence an order to that effect was entered and the suit ordered dismissed for want of jurisdiction because of the character of the parties, unless complainant should amend so as to show jurisdiction under the above ruling (p. 45).

As a last resort against this adverse ruling counsel for

complainant amended her bill by eliminating the bank as a defendant and making other verbal changes rendered necessary thereby (p. 46), and then applied for a decree against Felipe Cuebas alone, on whose behalf no defense had been at any time made since the original entry of appearance by him. But even this measure of relief was denied complainant for reasons explained in an opinion (pp. 47-53), and a final decree was rendered definitely dismissing complainant's bill (p. 53), from which decree this appeal has been prosecuted and the following errors are assigned (p. 54):

Assignment of Errors.

First. In holding as matter of law that defendant bank was not a foreign corporation—an alien in the jurisdictional sense.

Second. In holding that because said bank was not a foreign corporation the court was thereby ousted of jurisdiction over it in this suit.

Third. In holding that said bank was an indispensable party defendant.

Fourth. In dismissing complainant's bill.

Fifth. In not granting complainant a decree at least as against defendant Felipe Cuebas.

ARGUMENT.

I.

BANK SHOULD NOT HAVE BEEN DISMISSED AS DEFENDANT.

As explained in the foregoing statement, the parties at the time the bank set up for the second time and induced the court to allow its plea to the jurisdiction were: Complainant, a Porto Rican; one defendant, a citizen of the United States; the remaining defendant, the bank itself (p. 48).

We therefore insist that the court below had jurisdiction of the case and of the bank as a party thereto and erred in holding to the contrary.

(*a*) Because the bank was in law a Spanish corporation.

(*b*) Because even if the bank was not a Spanish corporation the presence of one party defendant, who was a citizen of the United States, was sufficient to give the court jurisdiction of the cause and of all proper parties thereto.

(*a*) *Defendant bank was in law a Spanish corporation.*

The court below at first declared that the bank was in law what it was alleged to be (pp. 34-38), but it was later induced to reverse itself in view of the decision of this court in Martinez *vs.* La Asociacion, etc. (213 U. S., 20), and held that the bank under that decision was not sufficiently alien to sustain jurisdiction any more than had been the Asilo de Damas in that case (pp. 48-9).

We must confess never to have entirely understood the course of reasoning followed by this court in the Martinez case, and now ask the court, if the doctrine there announced should be held applicable here, to reconsider its ruling therein. This court had certainly previously decided that a

corporation owes allegiance to the sovereignty which created it and must be considered a citizen or subject of that sovereign.

> Bank of Augusta *vs.* Earle, 13 Peters, 519.
> Insurance Company *vs.* Francis, 11 Wal., 210.
> Shaw *vs.* Quincy Mining Company, 145 U. S., 444.
> Jellnik *vs.* Huron Copper Company, 177 U. S., 1.

In the above-cited case of *Insurance Company vs. Francis* this court said, on page 216 of the report:

> "The declaration avers that the plaintiff in error is a corporation created by an act of the legislature of the State of N. Y., located in Aberdeen, Mississippi, and doing business there under the laws of the State. This, in legal effect, is an averment that the defendant was a citizen of N. Y., *because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of business is there, and can be no where else.* Unlike a natural person, *it cannot change its domicile at will,* and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

Probably the most oft quoted case of all is the one first above cited wherein, describing the legal status of a corporation, it was stated at page 588:

> "It exists only in contemplation of law and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and *cannot migrate to another sovereignty.* But although it must live and have its being *in that State only,* yet it does not by any means follow that its existence there will not be recognized in other places."

Repeating the above quotation, Mr. Justice Gray, in a later case, went on to emphasize still further the necessary de-

pendent relation between the creator and the creature as follows:

> "This statement has been often reaffirmed by the court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation *can only be* in the State by which it was created, although it may do business in other States whose laws permit it."
>
> Shaw *vs.* Quincy M. Co., 145 U. S., 444, 450.

Still more recently the court said in the *Jellenik case* (*supra*):

> "The habitation or domicile of the company is and must be in the State that created it."

We feel safe in saying that, wherever a corporation originally chartered by one sovereignty has been judicially held to be a citizen or subject of another sovereignty, it will be found that such conclusion resulted from a new incorporation or its equivalent by the second sovereignty, as was the case with Dartmouth College, which had become a New Hampshire corporation by adoption after the separation of that State from the mother country. If this defendant bank was a corporation under Spanish law before the sovereignty of the Island of Porto Rico was changed (which the court below found and admitted), and if it continued its business after that change of sovereignty and without any legislation affecting it (which was also admitted), we fail to see by what power its character has been changed or its allegiance transferred, nor can we see what materiality can be attached to the question of where its office or business may be located. Under the above decisions its *legal habitat* must continue to be within the kingdom of Spain.

We believe that the existence of the bank as a Spanish corporation could only be terminated by legal dissolution or by forfeiture by that sovereignty.

Frost *vs.* Frostburgh Coal Co., 24 How., 278.

The reasoning of the justice who delivered the decision in the Martinez case indicates that the corporation there involved could not continue to be Spanish because by the cession of Porto Rico its field of activity was no longer within Spanish territory. A proposition analogous in character was, we think, considered and decided by this court in two early cases involving a charitable corporation which existed in England before the Revolution and still had property in Massachusetts and Vermont after they became States.

Society, etc., *vs.* New Haven, 8 Wheat., 464-483.
Society, etc., *vs.* Pawlet, 4 Peters, 480, 502.

In the first-cited case this court, considering the effect of the corporation being exempt from control by the sovereignty where its property was situated, concluded its reasoning as follows:

> "But it is not perceived by the court how this exemption of the corporation from the jurisdiction of a foreign court to forfeit its franchises, or to interfere in its management of the charity can destroy, or in any manner affect, *its civil rights,* or its capacity to hold and enjoy the property legally vested in it."

The judge below expressly found the facts necessary to support our contention as shown by his language on page 38 of the record, where he says:

> "We come to this conclusion for the further reasons that the concern was born under the Spanish law, that it appears to exercise all the necessary functions of a corporation, that nothing has occurred to change its personality since the change of sovereignty, and because it is no concern of this court on this issue whether it is continuing business in accordance with or in contravention of any local law."

We respectfully suggest that, compared with the decisions above cited, the reasoning of this court in the *Martinez case,* leading to the contrary conclusion, is unsatisfactory and inconclusive.

It might even be argued that this was apparent to the court itself because the effect and applicability of that decision was by its terms limited to that particular case and Mr. Justice Moody, who delivered the opinion, not only failed to decide just what the legal status of the institution was and specifically left that question open, but further expressed the court's disinclination to apply the reasoning to any differing circumstances by using the following language:

> "We confine this statement to a corporation like the one before us, formed for charitable purposes and limited in its operations to the ceded territory, a different question (which need not be decided) would be presented if the corporation had other characteristics than those possessed by the one under consideration, as, for instance, if it were a Spanish trading corporation, with a place of business in Spain but doing business by comity * * * in the Island of Porto Rico."

The "different question" is apparently here presented, as a banking corporation may well be considered a trading one and the other enumerated qualifications are present except that of having a place of business in Spain; and the way is thus open to distinguish the case at bar from that case. But we desire to deal with the court with entire frankness and to say that if the fundamental principles relating to the creation of corporations and their relation to the creating power, as explained in the various decisions of the court hereinbefore quoted from be applied, we believe the difference between the two corporations as to the manner of their formation and the character of their corporate functions will be found to be superficial and without effect upon the conclusion to be reached upon the question here involved; and that the distinctions suggested in the opinion above quoted and the desire to limit its effect really resulted from the dissatisfaction of the writer of that opinion with his own reasoning.

If, therefore, upon either of the grounds hereinbefore presented this court should conclude that the defendant should have been held to be a Spanish corporation, the other defendant being admittedly a citizen of the United States, there can remain no question of the jurisdiction of the court over the suit as it stood at the time of the ruling complained of. (Act March 2, 1901, sec. 3; 31 Stats., 963.)

(*b*) *One foreigner or citizen of the United States as a party sufficient to sustain jurisdiction.*

The extent of the jurisdiction of the Federal court in Porto Rico, as fixed by the character of the parties to the suit, has been the subject of much contention there. The question is concededly governed by the provisions of an amendment to our Civil Government act, which was approved and became a law March 2, 1901, a little less than a year after the passage of the original act (31 Stats. at Large, 953), of which amendment section 3 reads as follows:

> "That the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

From the time of the passage of this amendment until a decision which will be cited below, the bench and bar in Porto Rico, depending upon the known intention of Congress to thereby *enlarge the jurisdiction* of that court, had construed the phrase "the parties or either of them" as though the word "parties" meant "litigants" and the word "either" were synonymous with "any," so that it was considered sufficient to sustain the jurisdiction if among the

necessary parties litigant on either side was found a single "citizen of the United States or citizen or subject of a foreign state." This was opposed by the contention that the word "parties" was used collectively and meant all the litigants on the one side or the other. So far as the lower court is concerned, its earlier action was reversed by its decision in the case of Luis Vallecillo *et al. vs.* Bertran Hermanos *et al.* (2 P. R. Fed., 46), holding with the latter view.

This question has never come before this court for adjudication, but we feel confident that the original construction given the statute by the court below was right, and we ask this court now so to declare. That result seems to us logical for several reasons:

(1) Because it is consistent with the ordinary and simple meaning of the language used. If Congress had intended to restrict the jurisdiction to cases where *all parties,* either plaintiff or defendant, were within its provisions, it could very easily have made that meaning plain.

One of the definitions of the word "either," given by Webster, is "one or another of any number," and that definition is appiled as its ordinary legal meaning in numerous decisions.

Lafoy *vs.* Campbell, 42 N. J. Eq., 34.
Messer *vs.* Jones, 88 Me., 349, 356.
Ft. Worth Co. *vs.* Rosedale Co., 68 Tex., 169.
Dew *vs.* Barnes, 54 N. C., 149.
Graham *vs.* Graham, 23 W. Va., 36, 43.
People *vs.* Willis, 39 N. Y. Supp., 987, 989.

(2) Because the word "parties" is used in its sense of ordinary legal acceptation analogous to its use in such phrases as "necessary parties," "indispensable parties," "parties litigant," etc. There is nothing to show that Congress intended to use the word in any technical or restricted sense. This

court will take judicial notice of political conditions and the general purposes of legislation, and so doing it is matter of history that the Federal Court of Porto Rico was established, and its jurisdiction afterwards enlarged by this amendent, for the very purpose of securing full protection to the property rights of the American citizens and foreigners resident in Porto Rico. If this purpose be recognized, then it clearly can make no difference whether the interests of one such individual or more than one were involved in the litigation, or whether the interests of such individual were separate or combined with those of some citizen of Porto Rico.

(3) Because, as the object of the amendment was to enlarge the jurisdiction, it should be liberally construed for that purpose.

The only possible argument for a contrary construction is that advanced by the judge below in the Vallecilla case above cited. There the court followed the reasoning of cases from this court (especially Smith *vs.* Lyon, 133 U. S., 316), construing the jurisdictional acts respecting diverse citizenship, enacted for the purpose of meeting conditions in the States the very opposite of those to meet which the Porto Rican statute under discussion was enacted.

This distinction is aptly expressed by the present Chief Justice, referring to the right of removal under this act of 1901, in the case of Garrozi *vs.* Dastas, 204 U. S., 73, wherein this court said:

> "In consequence of the enlarged character of the jurisdiction conferred by that act, *and the obvious departure which it manifests from the principles controlling the jurisdiction of a United States court,* as contradistinguished from a State court, we do not think the rule which demarks the line between the courts of the United States and State courts within the removal act should be held applicable to Porto

> Rico, to the extent which might have obtained had the act of 1901 not been enacted." (Italics ours.)

The analogy and applicability of the authorities cited in the Vallecilla case as a basis for that decision affecting the jurisdiction of the court below, entirely fail when it is borne in mind that the purpose of the statutes on which the authorities were predicated have repeatedly been recognized as intended to *restrict* the jurisdiction of the courts affected, while the purpose of Congress in the enactment of the statute for Porto Rico was to *enlarge* the jurisdiction.

Therefore, whether or not the defendant bank was in such sense an alien institution as to aid in sustaining the jurisdiction, that jurisdiction properly and sufficiently attached because one of the parties defendant—and the only indispensable one—was a citizen of the United States. The discussion under this head applies to the first two assignments of error, which, we think, are shown to be well founded.

II.

DEFENDANT BANK NOT AN INDISPENSABLE PARTY.

After the court below had held that the defendant bank was not a foreign corporation, hence that all the parties defendant were not within the definition of the statute governing jurisdiction as by it defined, and jurisdiction had therefore failed, and that the suit must be dismissed on that ground unless the complaint be amended so as to avoid the effect of the ruling (p. 45), complainant was compelled to amend her bill to conform to the ruling, which she did by dismissing as to said bank (p. 46), and prayed for a decree against defendant Felipe Cuebas alone (p. 47). Thereafter there were left only two parties, a Porto Rican complainant and a citizen of the United States defendant, who had

allowed a *pro confesso* to be entered against him. Yet the court still refused to grant the complainant a decree against the defaulting party and, to the contrary, dismissed her bill.

No one reason seems to have induced this action on the part of the court. In fact a reading of the long opinion delivered (pp. 47-53) by the judge indicates that he was swayed by various considerations, and at the same time makes plain that his mind was confused as to the actual status of the case. Although he starts out with the plain statement that the application was to "grant her (the complainant) a decree against the now sole respondent, Felipe Cuebas y Arredondo, on her bill taken as confessed against him," yet he goes into a consideration of what was set up in *the answers of the bank*, no longer a party (p. 48, bot.), and relates all the facts "as gathered from the voluminous exhibits, papers, pleadings, transcripts of evidence, etc., in the files" and again states what "is set forth in the three answers of" the bank (p. 49, bot., 50), including the defenses therein set up of the statute of limitations and laches. He then comes back to a consideration of the bill itself—the only legitimate subject for consideration at that time, as we conceive—and suggests that complainant "is not and never has been under the allegations of her bill entitled to a decree" (p. 51). Reading on to ascertain his reasons, we first find a reference to the statute of limitations, but without expressing a definite conclusion the court continues:

> "It might be said that this period (of limitation) begins to run after the mortgage is due and not after it is made, but in this case it does seem to us that her remedy in the first instance was in the insular court, where she could have made El Banco Territorial y Agricola a party, because it does seem to us that it certainly is an indispensable party to the controversy. If her cause of action was not in fact outlawed as against the whole world at the time she filed her bill, then surely it is not even yet prescribed as to El Banco Territorial y Agricola, and she still has her remedy

> against it wherever she can sue it, because it has had full notice of her claim since the date of the filing of her bill."

Then, after a digression which has no connection with the above, the court continues (p. 52):

> "It may be contended that the knowledge we have, which enabled us to make the statement aforesaid, is obtained in part from some of the several answers, the evidence, and other pleadings in the case, and all of which it may be claimed has now become unofficial and immaterial in the issue that remains—but notwithstanding this, depending upon the bill alone, we can well see that the banco was from the very start an indispensable party to the controversy, and counsel for the complainant were certainly of the same opinion and manifested it by joining el banco as a respondent and making a four-year battle in an effort to maintain its Spanish citizenship.

It thus seems that so far the judge's mind was really controlled by the idea that the bank was an indispensable party; but in a later paragraph on the same page he discusses the question of laches, and then concludes with the following résumé of his reasons (p. 53):

> "To grant her the decree she now asks for is too dangerous a proposition: first, because her demand is so stale; second, because in our opinion the rights of others may have grown superior to hers, if any she has; and third, because of the unnecessary complications which would result."

Let us consider in their order the various grounds suggested for its action in the above extracts from the court's opinion (which include all the suggestions made), and see whether any of them are well founded:

First, statute of limitations.

While it is true, as stated in the opinion, that the complainant's mortgage was *dated* 29 years before this suit was brought, it is equally true that attached to the bill of complaint was a certified copy of a notarial instrument whereby the remaining defendant, Felipe Cuebas, had in 1892 acknowledged its continued existence and directed his attorneys-in-fact to pay it (Exhibit F, page 20). The suit was begun in 1904, twelve years later, and no claim is made that the limitation of actions upon mortgages was less than twenty years. No support for a contention of prescription can be shown without ignoring entirely the allegations of paragraph VIII of the bill and said exhibit attached to sustain it.

Moreover, prescription is a *defense* which must be pleaded or claimed. Here the defendant, against whom the decree was being asked, had made no defense or claim; he had always recognized the debt and was willing the plantation should be subjected to its payment.

Second, the bank an indispensable party.

The anxiety of the court below to maintain a preconceived notion is seen from that clause of the foregoing quotations in which it was said that "depending upon the bill alone, we can see that the banco was from the very start an indispensable party." Now, the bill may be read from its first stating paragraph to its last without finding other reference to the bank than that contained in paragraph X, wherein it is alleged that defendants Antongiorgi and the bank

> "have or claim some interest in said mortgaged premises, or in some part thereof, as purchasers, mortgagees or otherwise, the exact nature and extent of which interests are unknown to your orator, if any at all they have, but the same are inferior and subsequent to the lien of the mortgage of your orator and subject thereto."

This is the form-book expression with reference to subsequent lienholders or claimants in mortgage foreclosures, and we had supposed it was elementary that such subsequent or *inferior* claimants could be made parties defendant or not, at the pleasure of complainant; in other words, were proper but neither necessary nor indispensable parties.

Brewster *vs.* Wakefield, 22 How., 118, 128-9.

But even if it might have resulted, as the court appeared to think it would, that the lien of the bank was *superior* to that of complainant, still the bank was neither a necessary nor an indispensable party.

Nalie *vs.* Young, 160 U. S., 642.

Jerome *vs.* McCarter, 94 U. S., 736.

In this connection it is to be borne in mind that, by the admission of the bank itself in one of those answers the court so insistently claimed the right to consider, its only claim to the plantation *at the time it was summoned* as a defendant in this suit was that of a mortgagee. The *order pro confesso* entered on the 11th of July, 1904 (p. 24), shows that the subpœna was served on the bank on *March 24, 1904*, while paragraph V of the bank's last answer (p. 41) admits that its foreclosure suit in the insular court against Felipe Cuebas was not begun until *September 2, 1904*.

Whether, therefore, the bank was a prior or subsequent mortgagee as a matter of law, it was *nothing more* than a mortgagee, and could not have been under the above authorities an indispensable party.

Third, laches or staleness of the demand.

It hardly needs the citation of authorities to sustain the proposition that laches is not a defense to a suit for foreclosure of mortgage, that defense being confined to cases of a

character where no statute of limitations is directly applicable and the jurisdiction is not concurrent.

Story's Equity Juris. (13th Ed.), sec. 1520.
Rankin *vs.* Scott, 12 Wheat., 177.
Cross *vs.* Allen, 141 U. S., 528.
Met. N. Bank *vs.* Dispatch Co., 149 U. S., 448.
Boone *vs.* Pierpont, 28 N. J. Eq., 7.
Diefenthaler *vs.* New York, 111 N. Y., 331.
Fullwood *vs.* Fullwood, 9 Ch. Div., 176.
In re Baker, 20 Ch. Div., 230.

Fourth, rights of others become superior.

The simple answer to this is that if rights of others had become superior they would remain superior despite any decree that might be entered *where they were not parties.* If the court had borne in mind that all it was passing upon, or could pass upon after the dismissal of the bank as a party, was the right of complainant to a decree *against Felipe Cuebas alone,* and that the rights of parties not before the court could not be affected by that decree, it seems to us that it would have saved itself much useless discussion and an erroneous conclusion.

Fifth, unnecessary complications resulting.

We do not understand that the right of parties to a decree can be made to depend upon whether the consequences of the decree to which a complainant is clearly entitled may tend to simplify or complicate any future controversies with outside parties. Yet there was no foundation for such a suggestion. The decree asked for would simply have settled the right of complainant to foreclose whatever right or title Felipe Cuebas or his heirs might have had. Whether complainant had any rights as against

the bank would have remained unsettled and unaffected, just as it now remains after the dismissal of complainant's bill. No additional complications could possibly result. The one question between complainant and defendant would be finally settled, and all other questions would remain as they had been.

Neither can a court relegate a litigant to another forum merely because, in its opinion, such course would be more expedient.

McClellan *vs.* Garland, 217 U. S., 268, 282.

On the contrary, it has been expressly held that, where a Federal court will be deprived of its jurisdiction based upon the character of the parties by the presence of some party not absolutely indispensable, a complainant will be allowed to dismiss as to any such party if a proper decree can be entered in his absence which does not effect his interest—which was exactly what complainant asked leave to do when forced to dismiss as to the bank.

Vattier *vs.* Hinde, 7 Pet., 252, 261.
Horn *vs.* Lockhart, 17 Wall., 570, 579.
Tug, etc., Co. *vs.* Brigel, 30 C. C. A., 415.
Boatman's Bk. *vs.* Fitzlen, 68 C. C. A., 288, 296.

Again, the anxiety of the court to sustain an untenable position led it to an erroneous statement of law, where the judge says, in the closing paragraph, "that forum (the insular court) first took possession of the *res.*" We have above shown that this suit was begun before the one in the insular court, and this court has repeatedly decided that by the filing of a foreclosure bill the mortgaged property is theoretically placed *in custodia legis.* Hence the court below and not the insular court "first took possession of the *res.*"

Farmers' L. & T. Co. *vs.* Lake St. E. R. Co., 177 U. S., 51.

The considerations discussed under the above head cover the third and fourth assignments of error and show, we submit, that they are well assigned.

III.

DECREE SHOULD HAVE BEEN GRANTED AGAINST DEFENDANT CUEBAS.

The fifth and last error assigned is in substance that even if its ruling regarding the bank was right, the court below erred in not granting complainant a decree against Felipe Cuebas after a dismissal had been entered as to the bank. This raises a question entirely independent of those already considered.

The record shows the service upon defendant Cuebas (p. 23) and the subsequent entry of a decree *pro confesso* against him (p. 24). This decree *pro confesso* remained in force during all the subsequent proceedings in the cause and defendant Cuebas made no defense up to the time of his death, which is shown by the motion upon which his succession has recently appeared in this court as parties appellee to have occurred on the 7th day of May, 1906. No revivor took place in the court below as against that defendant, because under the Porto Rican law the succession of a deceased is not determined until the persons entitled are declared such either in a last will and testament of the deceased or by proper court order in the proper insular court. In the present instance defendant Cuebas left no will and the sucession was not declared (by court order) until the 12th day of December, 1911, as also shown by the exhibits attached to the said motion made in this court.

After complainant was by the ruling of the court below upon the question of citizenship forced to dismiss her bill as to the defendant bank, and after having suggested to the court the death of the defendant Cuebas, her counsel re-

quested the entry of a final decree in terms stated upon court record as follows (p. 47):

> "He thereupon requests that, as Felipe Cuebas in his lifetime failed to respond in the cause, a decree *pro confesso* was taken against him, and requests that the court now permit the complainant Irene Cuebas to take a final decree in the premises as of date previous to the date of the death of Felipe Cuebas, so as to avoid the necessity for reviving as against his succession, and because of the long delay in the case, and the fact that such decree *pro confesso* was entered several years ago against him."

We submit that this request should have been granted. We are not unaware that in many of the State jurisdictions practice in equity cases after a decree *pro confesso* requires the production of sufficient evidence *ex parte* on the part of the complainant to make out a *prima facie* case in support of his bill; but such procedure is not required under the equity practice of the Federal courts, which practice by the terms of the Civil Government act for Porto Rico hereinbefore referred to governs the court below. It has been uniformly held that under the provisions of rules 18 and 19, promulgated by this court to govern practice in suits in equity, a complainant after an order *pro confesso* is entitled without the production of supporting proof to such a decree as is warranted by the allegations of his bill.

Thompson *vs.* Wooster, 114 U. S., 104.

Ohio Cent. R. Co. *vs.* Central Trust Co., 133 U. S., 83, 90.

And it is also to be noted that the court's refusal of this request of complainant was not based upon any question of proof, but upon the supposed infirmities of the bill itself.

It has further been held that upon the death of a party defendant during the progress of a cause the court may upon request of complainant enter its final decree *nunc pro tunc*

as of a date prior to such death so as to avoid the necessity of proceedings for revivor.

Mitchell *vs.* Overman, 103 U. S., 62.
New Orleans *vs.* Gaines' Adm'r, 138 U. S., 595, 612.
Campbell *vs.* Misier, 4 John. Ch., 342.

These decisions are particularly applicable here, because an earlier application for a final decree against the one defendant who had defaulted was prevented by the continued contest with the other defendant, the bank.

Frow *vs.* De La Vega, 15 Wall., 552.

In the case at bar the bill clearly made a case within this rule, because not only did its allegations show the existence of the mortgage and the amount due thereon, its ownership by the complainant under the will of her deceased husband, and its recognition well within the period limited for foreclosure proceedings, but all these allegations were supported by public notarial instruments attached as exhibits to the bill and thereby made a part thereof.

The bill in this case was filed on the 22d day of March, 1904 (p. 23), the appearance of defendant Cuebas was entered on the 2d day of May, 1904, and the decree *pro confesso* against him (pp. 23-24) was entered on the 11th day of July, 1904. Under the rules above cited, complainant would have been entitled to a final decree upon said order *pro confesso* at any time after thirty days from said 11th day of July, 1904, had Cuebas been the only party defendant, while said defendant Cuebas did not die, as above stated, until the 7th day of May, 1906.

We submit, therefore, that the court should have granted our request by decreeing in favor of the foreclosure of complainant's mortgage for the amount alleged by the bill of complaint to be due, dating said decree as of some date between August 10, 1904, and May 7, 1906.

If the inquiry should occur to the court whether any importance should be attached to the allegation made in the last answer of the bank as to the non-transfer of complainant's mortgage from the old to the new registry books, we may say in explanation that, while that question may be material as to the bank (and we are ready to contest it if the bank is restored as a pary), the Supreme Court of Porto Rico has held that such non-transfer would not affect complainant's rights as against the mortgagor or his transferees subject to its lien.

Cass *vs.* Registrar of Property, 6 P. R. Rep., 319.

IV.

For the reasons specified and supported under the above heads, we pray the court that the final decree rendered by the court below on the 7th day of September, 1909, be vacated and set aside; that the interlocutory order dated the 7th day of June, 1909, may be also directed to be vacated by the court below after the setting aside of said final decree; that it may be declared that the court below had jurisdiction of said suit while said defendant bank was a party and of said bank as a party thereto, and that the court below may be also directed to take such further proceedings herein as may be in accordance with law as declared by this court in its decision herein.

Respectfully submitted,

FREDERICK L. CORNWELL,
N. B. K. PETTINGILL,
Counsel for Appellant.

FILED
JAN 16 1912
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 169.

IRENE CUEBAS Y ARREDONDO,

Appellant,

against

FELIPE CUEBAS Y ARREDONDO,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF ON BEHALF OF BANCO TERRITORIAL Y AGRICOLA, SUBMITTED AMICUS CURIÆ.

F. KINGSBURY CURTIS,
HENRY A. STICKNEY,
Counsel.

BYE WORKS PRINT JOB PRINTING OFFICE, 150 NASSAU ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1911, No. 159.

IRENE CUEBAS Y ARREDONDO,
Appellant,

AGAINST

FELIPE CUEBAS Y ARREDONDO.

Appeal from the District Court of the United States for Porto Rico.

We respectfully ask the leave of this Court to file this brief *amicus curiae* on behalf of the Banco Territorial y Agricola (hereinafter called the "Bank"), upon certain matters in respect to which the appellant seeks upon this appeal a determination of this Court purporting to affect said Bank, although it is now neither a party to the action nor to the pending appeal. The Bank was originally a party defendant in this suit, but as the bill of complaint was subsequently amended by Appellant by dismissing the action as to said Bank (Rec., p. 46), the Bank is no longer a party to the action and is not a party to this appeal.

This action was commenced on March 22, 1904, by the appellant, a Porto Rican, against the appellee Felipe Cuebas y Arredondo, who was then a citizen of the United States and is now deceased, Francisco Antongiorgi, a Porto Rican, and Banco Territorial y Agricola, alleged in the bill of complaint to be a Spanish corporation (Rec., p. 1).

The action was for for the foreclosure of an alleged mortgage made on October 7th, 1875 (Rec., p. 3). The bill of complaint alleges that the Bank is made a party defendant because it claims to have an interest in the property sought to be foreclosed (Rec., p. 6).

The bill of complaint was dismissed as to the defendant Francisco Antongiorgi on June 1, 1907 (Rec., p. 31). On June 1, 1907, after the case had been pending in the Court below undisposed of for over three years, the Court below ordered without objection or exception on the part of complainant that all proceedings theretofore taken be set aside and that the cause be allowed to stand on the bill as originally filed and the Bank's plea to the jurisdiction, but dismissed as to defendant Antongiorgi (Rec., p. 31). On January 15, 1909, the Bank answered, alleging, among other defenses, that the Court was without jurisdiction in the case because the Bank was a joint stock company organized under the laws of Porto Rico, and that it was a citizen of said Island and not a citizen of Spain or of the United States (Rec., p. 39). The answer of the Bank also alleges that the alleged mortgage of which the complainant claimed to be the owner was never recorded; that without any actual or constructive notice it made two loans to Felipe Cuebas, upon the property covered by complainant's alleged mortgage; that the second of the two mortgages made by Cuebas was foreclosed, the Bank purchasing the property at public sale (Rec., pp. 40-41). The Bank also pleaded the fifteen and also the twenty-years statute of limitations (Rec., p. 42). On June 7, 1909, the Court below rendered an opinion in which it held, upon the authority of the opinion of this Court in the case of *Martinez* v. *Asociacion de Senoras*, 213 U. S., 20, as follows:

> "* * * Banco Territorial y Agricola is "at least not a Spanish corporation and that

> "hence the jurisdiction fails for lack of di-
> "verse citizenship. The cause will, therefore,
> "stand dismissed with costs against the com-
> "plainant, without further action of the
> "court, unless within five days from this date
> "the bill can be so amended as to give the
> "Court jurisdiction and an order to that ef-
> "fect will be entered" (Rec., pp. 45-6).

No objection, exception or appeal was ever made or taken by complainant to or from this order (Record, p. 46). Moreover, on June 10, 1909, the complainant apparently acquiescing in the Court's view again amended her bill of complaint by dismissing the same as to the Banco Territorial y Agricola (Record, p. 46). On September 7th, 1909, the Court below made a decree refusing to enter judgment against Felipe Cuebas, deceased, the only remaining defendant, and finally dismissed the complainant's bill of complaint (Record, p. 53). The present appeal is from the last-mentioned decree (Record, p. 55).

In spite of the fact that the complainant voluntarily dismissed her action as against the Bank, she now assigns the following, among others, as errors alleged to have been committed by the Court below:

> I.
>
> The Court erred in holding that the defendant, Banco Territorial y Agricola, was not estopped to deny the admission of its pleading that it was a corporation existing under the laws of Spain.
>
> II.
>
> The Court erred in holding that said defendant, Banco Territorial y Agricola, was not a foreign corporation.
>
> III.
>
> The Court erred in holding that, even were said Banco Territorial y Agricola not a foreign corporation, the Court was ousted of jurisdiction over it by reason thereof.

I.

Since the Bank is not a party to the appeal, the questions raised by the First, Second and Third Assignments of Error are not before this Court for determination.

The appeal now pending is from a decree which was entered after the Bank, by the voluntary action of the complainant, had ceased to be a party to the cause, and the Bank is, therefore, not a party to this appeal.

The first three assignments of error raising questions parporting to affect the Bank are, therefore, not before the Court for determination on this appeal. The Court will not determine questions affecting parties who are not before it.

Marshall Field & Co. *v.* Wolf & Bro. Co., 120 Fed., 815;
Wilson *v.* Kiesel, 164 U. S., 248;
Boyd *v.* Stuttgart & A. R. R., 84 Fed., 9;
Ill. Trust & Sav. Bank *v.* Kilbourne, 76 Fed., 883;
Davis *v.* Trust Co., 152 U. S., 590.
Grand Is. & W. C. R. Co. *v.* Sweeney, 95 Fed., 396; 103 Fed., 342, 348.

II.

By the voluntary dismissal as against the Bank, the complainant is precluded from questioning the decision of the Court below to the effect that it had no jurisdiction in the cause while the Bank was a party defendant.

On June 7th, 1909, the Court made an order dismissing the cause unless within five days the complainant amended her bill so as to give the Court jurisdiction (Record, p. 45). This order followed a memorandum of the Court below, in which it stated that the opinion of this Court in the Asilo de Damas case (213 U. S., 20) was sufficiently broad to indicate that the Bank, in the case at bar, "is at least not a Spanish corporation," such being the allegation as to citizenship of the Bank in the complainant's bill of complaint, and that hence the jurisdiction failed for lack of diversity of citizenship. The complainant did not object or except to this order of the Court below and no appeal was taken by her from said order. On the contrary, clearly acquiescing in the Court's view, complainant voluntarily elected to amend her bill of complaint as follows:

> "Comes now the complainant above named, by her solicitors, F. L. Cornwell and N. B. K. Pettingill, and, in pursuance of the permission granted by the Court in its order of the 7th day of June, 1909, conditionally dismissing said bill of complaint, hereby amend their said bill of complaint, for the purpose of retaining jurisdiction in this Court by dismissing the same as to said defendant El Banco Territorial y Agricola.
>
> And in order to make said bill of com-

plaint conform to such dismissal they hereby amend the same in the following particulars, to wit:

1. By striking from the same the last four lines of the preliminary paragraph of said bill in which the parties thereto are stated.

2. By striking out paragraph number X of said bill of complaint.

3. By striking out the name of said El Banco Territorial y Agricola wherever the same appears in the prayer for relief and in the prayer for process contained in said bill.

And said bill of complaint having been heretofore amended so as to dismiss one Francisco Antongiorgi as a defendant therein, and being now amended so as to dismiss the same as to said El Banco Territorial y Agricola, complainant hereby elects to proceed with the same as against the defendant Felipe Cuebas as sole defendant.

(Sgd.) F. L. CORNWELL,
N. B. K. PETTINGILL,
Solicitors for Complainant"
(Record, p. 46).

Thereafter the complainant moved that the cause "be considered as still pending as between the complainant Irene Cuebas against Felipe Cuebas *alone*," and asked for a final decree against him "as of date previous to the date of the death of Felipe Cuebas, so as to avoid the necessity for reviving as against his succession * * *" (Record, p. 47).

This prayer for a final decree against Felipe Cuebas was denied and the Court below, on September 7, 1909, dismissed the bill of complaint (Record, pp. 53-4).

The complainant's appeal from the last-mentioned decree, made after the Bank had ceased to be a party to the cause, cannot reinstate the Bank as a party defendant.

Hill *v.* Chicago & Evanston R. R. Co.,
140 U. S., 52, at page 54.

III.

The Court below correctly decided that with the Bank as a party defendant there was no jurisdiction in this cause.

While, for the reasons stated in the two preceding points it is believed that the question of the jurisdiction of the Court below over the Bank in this cause is not open for review upon this appeal, it is submitted that the Court below correctly held on the authority of the case of *Martinez* v. *Asociacion de Senoras*, 213 U. S., 20, that the Bank was not a Spanish corporation as alleged in the complainant's bill of complaint. As the case did not arise under the Constitution, or the laws or treaties of the United States, the jurisdiction of the Court below as entirely dependent on diversity of citizenship, and therefore failed for lack thereof.

F. Kingsbury Curtis,
Henry A. Stickney,
Counsel.

CUEBAS Y ARREDONDO *v.* CUEBAS Y ARREDONDO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 159. Submitted January 24, 1912.—Decided February 19, 1912.

Errors assigned as to finding of citizenship of a party dismissed from the suit at instance of appellant are not here for review except as to the force and effect to be given to a decree *pro confesso* against other defendants before dismissal of the bill.

Under the Foraker Act of April 12, 1900, 31 Stat. 85, c. 191, jurisdiction of the District Court of the United States was that of the District and Circuit Courts of the United States; the additional jurisdiction conferred by the act of March 2, 1901, 31 Stat. 953, c. 812, did not extend the jurisdiction so as to embrace all controversies in which any litigant on either side is a citizen of the United States or a subject of a foreign country.

The District Court of the United States for Porto Rico has not jurisdiction of a cause in which the sole plaintiff is a citizen of Porto Rico and any of the defendants are citizens of Porto Rico, notwithstanding one or more of the defendants may be citizens of the United States or of a foreign country.

By the act of March 2, 1901, Congress did extend the jurisdiction of the United States District Court for Porto Rico by cutting down the necessary jurisdictional amount and dispensing with diversity of state citizenship, by substituting United States citizenship therefor.

The final decree following a *pro confesso* order is only such a decree as would be authorized by the state of the pleadings when the order was entered.

If a bill is fatally defective, showing that the court had no jurisdiction, it is error to allow a *pro confesso;* the order should be vacated, and the defaulting defendant allowed to defend.

Where an amendment is allowed that changes the character of the bill and creates a jurisdiction not theretofore existing, the court should set aside a default and give time to defend.

A decree *nunc pro tunc* presupposes a decree allowed or ordered, but not entered through inadvertence of the court, or a decree under advisement when the death of a party occurs. *Mitchell* v. *Overman,* 103 U. S. 62.

No attempt at revision having been made at any time, there is no ground to enter a decree *nunc pro tunc* in this case on any known ground of equity procedure. *Gray* v. *Brignardello,* 1 Wall. 627.

3 Porto Rico Fed. Rep. 67, affirmed.

THE appellant, asserting herself to be a citizen of the Island of Porto Rico, filed this bill to foreclose a mortgage upon a plantation on the Island called "Carmelita." The defendants to the bill were three in number, namely, Cuebas y Arredondo, alleged to be a citizen of the United States, residing in Porto Rico, Francisco Antongiorgi, described as a citizen of and residing in Porto Rico, and El Banco Territorial y Agricola, alleged to be a corporation organized under the laws of Spain, and a citizen thereof, doing business in the Island of Porto Rico, with its principal place of business in the city of San Juan.

The averments as to the title and encumbrances upon

the said plantation, and the interests asserted by way of lien, or mortgage, by the defendants Antongiorgi and El Banco Territorial, etc., hereafter referred to as the Bank, are complex, and for the purposes of this case, upon the question now for decision, need not be stated otherwise than to say that the bill alleged that they "have or claim some interest in said mortgaged premises, or in some part thereof, as purchasers, mortgagees, or otherwise, the exact nature and extent of which interests are unknown to your orator, if any at all they have, but the same are inferior and subsequent to the lien of the mortgage of your orafor and subject thereto."

Aside from the usual prayer for a decree declaring and enforcing the lien of the mortgage asserted by a sale, etc., the bill asked that "the defendants and all persons claiming under them subsequent to the commencement of this suit, and all other persons although not parties to this suit who have any liens or claims thereon by or under any such subsequent judgment or decree, either as purchaser, incumbrancer or otherwise, may be barred and foreclosed of all equity of redemption in the said premises and that your orator may have such other and further relief as the nature of the case may require, and as to this court may seem meet and agreeable to equity and good conscience."

The bill was filed April 6, 1904, in the District Court of the United States for Porto Rico.

On July 11, 1903, the three named defendants, though duly summoned to appear by a rule day named and make their defense, made default, and the bill was on that day taken for confessed under equity rule 19, *et seq.*

In March, 1905, the bank was permitted to file its answer, in which it denied the equities of the bill and asserted its own superior right under mortgages, judicial sale, and by estoppel.

In October, 1906, it was permitted to withdraw its answer, and file a plea to the jurisdiction. That plea was

in these words, omitting the formal parts and conclusion:

"That this Court ought not to further take cognizance of the said bill of complaint because this defendant says that at the time of the filing of the same the Complainant herein was and still is a citizen of the Island of Porto-Rico and resident of the same and this defendant was and is a corporation organized and doing business under and by virtue of the laws of said Island of Porto-Rico and was and is a citizen of the same, and each and all of the other defendants herein are citizens and residents of the said Island of Porto-Rico, and that therefore this is a suit by and between citizens and residents of the said Island of Porto-Rico, of which this Court has no jurisdiction.

"That, as shown by the said Bill of Complaint, the jurisdiction of this Court over and of this suit is sought to be maintained not by reason of any Federal question being involved herein, but solely and only by reason of the alleged diverse citizenship of the parties herein and hereto and that as shown by the allegation of the said Bill of Complaint, the defendant is alleged to be a citizen of Spain and another of the defendants, to wit: Felipe Cuebas y Arredondo, is alleged to be a citizen of the United States of America and another of said defendants, to wit: Francisco Antongiorgi, is alleged to be a citizen of Porto-Rico, and that therefore it affirmatively appears by the allegations of the said Bill, if the same are true as therein alleged, that this is a case of which this court has not jurisdiction."

After first overruling this plea, for reasons set out in an opinion (4 P. R. Fed. Rep. 208), a rehearing was allowed and the plea sustained upon the ground that the bank was not a corporation of Spain, but one existing under the laws of Porto Rico, and a citizen of that Island for jurisdictional purposes (4 P. R. Fed. Rep. 509).

Prior to this action upon the plea of the bank, the date

not appearing, the complainant voluntarily dismissed her bill as to Francisco Antongiorgi, whom the bill had averred to be a citizen of Porto Rico.

The judgment on the plea of the bank, above set out, was, that for lack of the requisite diversity of citizenship the bill should stand dismissed, "unless within five days from this date the bill can be amended so as to give the court jurisdiction."

Thereupon complainant entered an order, entitled: "Irene Cuebas y Arredondo *vs.* Felipe Cuebas y Arredondo et al.," which is in these words:

"Comes now the Complainant above named, by her Solicitors F. L. Cornwell and N. B. K. Pettingill, and, in pursuance of the permission granted by the Court in its order of the 7th day of June, 1909, conditionally dismissing said bill of complaint, hereby amend their said bill of complaint for the purpose of retaining jurisdiction in this Court by dismissing the same as to said defendant El Banco Territorial y Agricola.

"And in order to make said bill of complaint conform to such dismissal they hereby amend the same in the following particulars to wit:

"1. By striking from the same the last four lines of the preliminary paragraph of said bill in which the parties thereto are stated.

"2. By striking out paragraph number X of said bill of complaint.

"3. By striking out the name of said El Banco Territorial y Agricola wherever the same appears in the prayer for relief and in the prayer for process contained in said bill.

"And said bill of complaint having been heretofore amended so as to dismiss one Francisco Antongiorgi as a defendant therein and being now amended so as to dismiss the same as to said El Banco Territorial y Agricola, complainant hereby elects to proceed with the same as against the defendant Felipe Cuebas as sole defendant."

Thereupon the complainant moved the court for a final decree against the sole defendant, Felipe Cuebas, "as of a date prior to the death of Felipe Cuebas, so as to avoid the necessity for reviving as against his succession," etc. This the court denied, and dismissed the bill.

From this decree an appeal has been prosecuted.

Mr. Frederick L. Cornwell and *Mr. N. B. K. Pettingill*, for appellant:

The court below had jurisdiction of the case and of the bank as a party thereto.

The defendant bank was, in law, a Spanish corporation. It did not cease to be Spanish because by the cession of Porto Rico its field of activity was no longer within Spanish territory. *Society &c.* v. *New Haven*, 8 Wheat. 464, 483; *Society &c.* v. *Pawlet*, 4 Pet. 480, 502.

Even if the bank was not a Spanish corporation, the presence of one party defendant, who was a citizen of the United States, was sufficient to give the court jurisdiction of the cause and of all proper parties thereto.

A corporation owes allegiance to the sovereignty which created it and must be considered a citizen or subject of that sovereign. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Insurance Co.* v. *Francis*, 11 Wall. 210; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Jellenik* v. *Huron Copper Co.*, 177 U. S. 1.

The existence of the bank as a Spanish corporation could only be terminated by legal dissolution or by forfeiture by that sovereignty. *Frost* v. *Frostburgh Coal Co.*, 24 How. 278.

One foreigner or citizen of the United States is a party sufficient to sustain jurisdiction.

This question has never come before this court for adjudication. The original construction given the statute by the court below was right. That result is logical.

It is consistent with the ordinary and simple meaning

of the language used. If Congress had intended to restrict the jurisdiction to cases where all parties, either plaintiff or defendant, were within its provisions, it could very easily have made that meaning plain.

For definitions of the word "either" see Webster, as "one or another of any number". That definition is applied as its ordinary legal meaning. *Lafoy* v. *Campbell*, 42 N. J. Eq. 34; *Messer* v. *Jones*, 88 Maine, 349, 356; *Ft. Worth Co.* v. *Rosedale Co.*, 68 Texas, 169; *Dew* v. *Barnes*, 54 No. Car. 149; *Graham* v. *Graham*, 23 W. Va. 36, 43; *People* v. *Willis*, 39 N. Y. Supp. 987, 989.

The word "parties" is used in its sense of ordinary legal acceptation analogous to its use in such phrases as "necessary parties," "indispensable parties," "parties litigant," etc. There is nothing to show that Congress intended to use the word in any technical or restricted sense. This court will take judicial notice of political conditions and the general purposes of legislation and so doing it is matter of history that the Federal court of Porto Rico was established, and its jurisdiction afterwards enlarged by this amendment, for the very purpose of securing full protection to the property rights of the American citizens and foreigners resident in Porto Rico.

As the object of the amendment was to enlarge the jurisdiction, it should be liberally construed for that purpose.

In *Valecilla* v. *Hermano*, 2 Porto Rico Fed. Rep. 46, the District Court followed this court in *Smith* v. *Lyon*, 133 U. S. 316, construing the jurisdictional acts respecting diverse citizenship, enacted for the purpose of meeting conditions in the States the very opposite of those to meet which the Porto Rican statute under discussion was enacted.

But see distinction aptly expressed in *Garrozi* v. *Dastas*, 204 U. S. 73.

Therefore, whether or not the defendant bank was in

such sense an alien institution as to aid in sustaining the jurisdiction, that jurisdiction properly and sufficiently attached because one of the parties defendant—and the only indispensable one—was a citizen of the United States.

The defendant bank is not an indispensable party. *Brewster* v. *Wakefield*, 22 How. 118, 128; *Nalie* v. *Young*, 160 U. S. 642; *Jerome* v. *McCarter*, 94 U. S. 736.

Whether, therefore, the bank was a prior or subsequent mortgagee as a matter of law, it was nothing more than a mortgagee, and could not have been, under the above authorities, an indispensable party.

Laches is not a defense to a suit for foreclosure of mortgage, that defense being confined to cases of a character where no statute of limitations is directly applicable and the jurisdiction is not concurrent. Story's Equity Juris. (13th ed.), § 1520; *Rankin* v. *Scott*, 12 Wheat. 177; *Cross* v. *Allen*, 141 U. S. 528; *Met. N. Bank* v. *Dispatch Co.*, 149 U. S. 448; *Boone* v. *Pierpont*, 28 N. J. Eq. 7; *Diefenthaler* v. *New York*, 111 N. Y. 331; *Fullwood* v. *Fullwood*, 9 Ch. Div. 176; *In re Baker*, 20 Ch. Div. 230.

A court cannot relegate a litigant to another forum merely because, in its opinion, such course would be more expedient. *McClellan* v. *Garland*, 217 U. S. 268, 282.

Where a Federal court will be deprived of its jurisdiction based upon the character of the parties by the presence of some party not absolutely indispensable, a complainant will be allowed to dismiss as to any such party if a proper decree can be entered in his absence which does not affect his interest—which was exactly what complainant asked leave to do when forced to dismiss as to the bank. *Vattier* v. *Hinde*, 7 Pet. 252, 261; *Horn* v. *Lockhart*, 17 Wall. 570, 579; *Tug &c. Co.* v. *Brigel*, 30 C. C. A. 415; *Boatman's Bk.* v. *Fitzlen*, 68 C. C. A. 288, 296.

This suit was begun before the one in the insular court, and by the filing of a foreclosure bill the mortgaged property is theoretically placed *in custodia legis*. Hence the

court below and not the insular court "first took possession of the *res.*" *Farmers' L. & T. Co.* v. *Lake St. E. R. Co.*, 177 U. S. 51.

A decree should have been granted against defendant Cuebas.

Under the provisions of equity rules 18 and 19, a complainant after an order *pro confesso* is entitled without the production of supporting proof to such a decree as is warranted by the allegations of his bill. *Thompson* v. *Wooster*, 114 U. S. 104; *Ohio Cent. R. Co.* v. *Central Trust Co.*, 133 U. S. 83, 90.

The court's refusal of this request of complainant was not based upon any question of proof, but upon the supposed infirmities of the bill itself.

Upon the death of a party defendant during the progress of a cause the court may, upon request of complainant, enter its final decree *nunc pro tunc* as of a date prior to such death so as to avoid the necessity of proceedings for revivor. *Mitchell* v. *Overman*, 103 U. S. 62; *New Orleans* v. *Gaines' Adm'r*, 138 U. S. 595, 612; *Campbell* v. *Misier*, 4 Johns. Ch. 342.

No brief filed for appellees.

Mr. F. Kingbury Curtis and *Mr. Henry A. Stickney*, by leave of the court, filed a brief as *amici curiæ* on behalf of Banco Territorial y Agricola:

Since the bank is not a party to the appeal, the questions raised by the first, second and third assignments of error are not before this court for determination. *Marshall Field & Co.* v. *Wolf & Bro. Co.*, 120 Fed. Rep. 815; *Wilson* v. *Kiesel*, 164 U. S. 248; *Boyd* v. *Stuttgart & A. R. R.*, 84 Fed. Rep. 9; *Ill. Trust & Sav. Bank* v. *Kilbourne*, 76 Fed. Rep. 883; *Davis* v. *Trust Co.*, 152 U. S. 590; *Grand Is. & W. C. R. Co.* v. *Sweeney*, 95 Fed. Rep. 396; 103 Fed. Rep. 342, 348.

By the voluntary dismissal as against the bank, the complainant is precluded from questioning the decision of the court below to the effect that it had no jurisdiction in the cause while the bank was a party defendant. *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52 at p. 54.

The court below correctly decided that with the bank as a party defendant there was no jurisdiction in this cause.

MR. JUSTICE LURTON, after stating the facts as above, delivered the opinion of the court.

The bank is not a party to this appeal. The appellant has elected to dismiss her bill, both as to it and the other Porto Rican defendant, Antongiorgi, for the express purpose of creating jurisdiction of a suit between complainant, a citizen of the Island of Porto Rico, and the remaining original defendant, Felipe Cuebas, a citizen of the United States. Her bill, as amended, contains no reference to the bank, or even of its existence. It was the bill, as thus amended, which was dismissed by the court. We mention this because two of the errors assigned and argued in the brief of counsel for appellant relate to the action of the court, first, in holding that the bank was in law a citizen of Porto Rico, and, second, in holding that, that being so, the jurisdiction of the court to maintain the suit, with citizens of Porto Rico, on both sides of the case, would be defeated. The action of the court in respect to the matter first mentioned is not here for review, and the other only in so far as it may become necessary to deal with it for the purpose of determining the force and effect to be given to the decree *pro confesso* against Felipe Cuebas.

It was not error in the situation of this case to deny a final decree against the succession of Felipe Cuebas upon the foundation of the *pro confesso* order made on a rule day five years theretofore. When that *pro confesso* was

taken against Cuebas the suit was one of which the District Court had no cognizance. The sole complainant was a citizen of Porto Rico, and Cuebas was a citizen of the United States and therefore subject to be sued in that court by the complainant, if the citizenship of the other persons on the same side was such as not to defeat jurisdiction. But that was not the case. One of them, Francisco Antongiorgi, was alleged in the bill to be a citizen of the Island of Porto Rico. The other defendant, the bank, was averred to be a corporation organized under the laws of Spain and a citizen thereof. But later, as we have already stated, the bank's plea that it was a corporation under the laws of Porto Rico and a citizen of Porto Rico was sustained. The case was, then, one which, upon the face of the bill, showed that one of the defendants had a citizenship common with that of the complainant, and later it turned out that a second had a like citizenship.

It is not and cannot be claimed that the complainant's bill asserted any right, title or claim arising under the laws or Constitution of the United States. If, therefore, the District Court had jurisdiction, it must depend upon diversity of citizenship alone.

It is claimed that the fact that one of the three defendants was a citizen of the United States conferred jurisdiction, although the other two were Porto Ricans, with a citizenship identical with that of the complainant. That this would not have been so under the Foraker act of 1900 is conceded. That act gave to the District Court for Porto Rico the jurisdiction of the United States District Courts, and added to that the jurisdiction of cases cognizable in Circuit Courts of the United States. The contention is that this extraordinary stretch of jurisdiction is conferred by the third section of the act of March 2, 1901, c. 812, 31 Stat. 953. That section reads as follows:

"That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Shortly stated, the construction placed upon this section is, that the word "parties" is not used collectively, meaning all of the litigants on the one side or the other, but is intended as if the word "litigants" had been used, and that the words "or either of them" means "any of them," and that the jurisdiction conferred embraces all controversies in which any litigant on either side is a citizen of the United States or a subject of a foreign country.

The construction contended for is out of accord with that placed upon the act in *Vallecillo* v. *Bertran*, 2 P. R. Fed. Rep. 46, a construction constantly adhered to by the court below since 1906. It is also a construction out of harmony with a long line of decisions of this court construing the jurisdictional clauses in the various statutes dealing with the question of jurisdiction dependent upon diversity of citizenship. The first of the decisions referred to involved the meaning of the clause in the Judiciary Act of 1789, conferring jurisdiction over controversies "where an alien is a party, or the suit is between a citizen of a State where the suit is brought and a citizen of another State." The question arose in *Strawbridge* v. *Curtiss*, 3 Cranch, 267, whether it was essential to jurisdiction that all of the parties on one side should have a citizenship different from that of all of the parties on the other. In that case the complainants were citizens of Massachusetts and some of the defendants were citizens of the same State. But one of the defendants was a citizen

of Vermont, and this fact was claimed to give jurisdiction. To this, the court, by Chief Justice Marshall, said:

"The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

This construction of that clause and of like words in later statutes, concerning jurisdiction dependent upon diversity of citizenship has been followed in many cases, among them being *Coal Co.* v. *Blatchford*, 11 Wall. 172, and *Smith* v. *Lyon*, 133 U. S. 315. In the case first referred to Mr. Justice Field stated the matter in words quite as applicable here, by saying: "If there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several co-defendants each defendant must be liable to be sued, or the jurisdiction cannot be sustained."

In view of these decisions we should be slow to conclude that Congress intended any other rule as to the arrangement of the parties where diversity of citizenship is the basis of jurisdiction than that laid down in construing like statutes upon the same subject. The contention that from the evident intention of Congress to enlarge the jurisdiction of the court we should infer an intent to confer jurisdiction to the extent claimed is without merit. Congress, in very plain words, did extend the jurisdiction, first, by cutting down the necessary jurisdictional amount to one thousand dollars, and second, by dispensing with diversity of state citizenship. United States citizenship is substituted for diverse state citizenship.

We, therefore, conclude that the court had no jurisdiction of this cause when the *pro confesso* order was entered against Felipe Cuebas.

The final decree following a *pro confesso* order is only such a decree as would be authorized by the state of the pleadings when the order was entered. *Frow* v. *De La Vega*, 15 Wall. 552; Daniel's Chancery Pl. & Pr., pp. 525–528, 5th ed., and notes; *Simmonds* v. *Palles*, 2 Jones and La Touche's 489; *Hardwick* v. *Bassett*, 25 Michigan, 149; *McDonald* v. *Mobile Life Ins. Co.*, 56 Alabama, 468. If the bill was fatally defective upon its face, showing that the court had no jurisdiction, it was error to allow a *pro confesso*, and upon the court's attention being called to it, it should have vacated the order and allowed the defaulting defendant to defend. *Nelson* v. *Eaton*, 66 Fed. Rep. 376; *Blythe* v. *Hinckley*, 84 Fed. Rep. 228, 244; *Eldred* v. *Am. Palace Car Co.*, 103 Fed. Rep. 209.

That the bill was subsequently amended so as to confer jurisdiction against Cuebas as sole defendant, by dismissing the bill against the other two defendants and striking out the prayer of the bill that any and every claim, interest, or incumbrance be forever barred and cut off, did not justify a decree based upon the order *pro confesso* made prior thereto. Upon such amendment being made, so completely changing the character of the bill, creating a jurisdiction which had not theretofore existed, the court should have set aside the default and given time to defend.

But the allowance of a final decree *nunc pro tunc* would have been still more inadmissible. Cuebas had been then dead for, apparently, some years. There had been no revivor. If there had been his representatives would doubtless have moved to vacate the *pro confesso* decree upon the ground suggested, and it would have been error to have denied that motion. The motion to enter a decree as of a day before his death would, if allowed, have been fruitless, for it would bear a date antecedent to the acquirement of jurisdiction, and therefore erroneous, if of any validity.

But no decree *nunc pro tunc* was admissible. Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court; or a decree in a cause which is under advisement when the death of a party occurs. *Mitchell* v. *Overman*, 103 U. S. 62. There is no claim that a final decree in pursuance of the allegations of the bill had ever been directed and through inadvertence of either court or counsel omitted from entry. There was, therefore, no authority for a decree *nunc pro tunc* upon any known ground of equity procedure. *Gray* v. *Brignardello*, 1 Wall. 627.

No effort to revive the cause against the succession of Cuebas was at any time made. The complainant stood upon her right to a final decree *nunc pro tunc*. When this was denied she still made no effort to revive the cause, though Cuebas had been dead a long time. It was not error in such circumstances to dismiss the bill.

Decree affirmed.